(19,038.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 387.

HENRY MUHLKER, PLAINTIFF IN ERROR,

vs.

THE NEW YORK AND HARLEM RAILROAD COMPANY AND THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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a Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 24th day of February, in the year of our Lord one thousand nine hundred and three, before the judges of said court.

Witness the Hon. Alton B. Parker, chief judge, presiding.

W. H. SHANKLAND, *Clerk.*

Remittitur, February 25th, 1903.

b HENRY MUHLKER, Respondent-Appellant,
ag'st
THE NEW YORK AND HARLEM RAILROAD COMPANY and Another, Appellants-Respondents.

Be it remembered, that on the 2nd day of July in the year of our Lord one thousand nine hundred and one, The New York and Harlem Railroad Company and another, appellants-respondents in this action came here into the court of appeals, by Ira A. Place, their attorney, and filed in the said court a notice of appeal and return thereto from the judgment of the appellate division of the supreme court in and for the first judicial department. And Henry Muhlker the respondent-appellant in said action, afterwards appeared in said court of appeals by Bushby & Berkeley, his attorneys, and also filed a notice of appeal herein.

Which said notices of appeal and the return thereto filed as aforesaid, are hereunto annexed.

c Whereupon, the said court of appeals having heard this cause argued by Messrs. L. M. Berkeley and James C. Bushby of counsel for the plaintiff, and by Mr. Ira A. Place of counsel for the defendants, and after due deliberation had thereon, did order and adjudge that the judgment of the appellate division of the supreme court appealed from herein be, and the same hereby is reversed and complaint dismissed without costs, on authority of the Fries case (169 N. Y. 270), that under the statute requiring the structure complained of the plaintiff has no remedy against this defendant, and the constitutionality of the statute being questioned it is further adjudged (1) that it does not violate the State constitution, (2) that it does not offend against that provision of the fourteenth amendment of the Federal Constitution providing that a person shall not be deprived of property without due process of law, and (3) that it does not contravene section 10 of article one of the

Federal Constitution forbidding the impairment of the obligation of a contract.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

d Therefore, it is considered that the said judgment be reversed and complaint dismissed without costs &c., &c., as aforesaid.

And hereupon, as well the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in sach case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

Court of appeals, clerk's office.

ALBANY, *February 25th*, 1903.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said action in the court of [SEAL.] appeals, with the papers originally filed therein attached thereto.

W. H. SHANKLAND, *Clerk.*

e In the Court of Appeals.

HENRY MUHLKER, Plaintiff, Respondent and Appellant,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants, Appellants and Respondents.

Case on appeal.

Bushby & Berkeley, attorneys for plaintiff, respondent and appellant, 220 Broadway, borough of Manhattan, New York city, N. Y.

Ira A. Place, attorney for defendants, appellants and respondents, Grand Central station, borough of Manhattan, New York city, N. Y.

Rec'd July 10, 1901.

BUSHBY & BERKELEY,
220 *B'dway.*

1 Supreme Court, New York County.

HENRY MUHLKER, Plaintiff, Respondent and Appellant,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants, Appellants and Respondents.

Statement under Rule 41.

This action was commenced on the 7th day of January, 1897; the summonses and complaints were served on the defendants on that day. The answers of the defendants were served on the plaintiff on the 25th day of March, 1897.

The names of the original parties are as they appear in the above-entitled action in full. By an order entered herein October 22, 1897, Bushby & Berkeley were substituted for Ezra A. Tuttle and James C. Bushby, as the plaintiff's attorneys; by an order entered herein October 30, 1900, Ira A. Place was substituted for Frank Loomis, as the attorney for the defendants. No other change in parties or attorneys has taken place pending the action.

2 N. Y. Supreme Court, City and County of New York.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILroad Company and The New York Central and Hudson River Railroad Company, Defendants.

Trial Desired in New York County. Summons.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of such service; and, in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, this 18th day of December, 1896.

EZRA A. TUTTLE,
JAMES C. BUSHBY,
Plaintiff's Attorneys.

Office and post office address, No. 120 Broadway, New York city.

3 New York Supreme Court, City and County of New York.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Defendants. } Complaint.

The plaintiff, by Ezra A. Tuttle and James C. Bushby, his attorneys, complains of the defendants and alleges, upon information and belief, as follows:

I. Each of the defendants is a domestic corporation created and existing by and under the laws of the State of New York.

II. The plaintiff is and for many years has been the owner of the premises known as Nos. 77 and 79 E. 115th street and 1626 Park avenue, in the city of New York, being situated on the westerly side of Park avenue, beginning at the corner formed by the intersection of the westerly side of Park avenue with the northerly side of 115th street, and running thence northerly along Park avenue 76 feet and 5 inches, more or less. The plaintiff has occupied and been in possession of said premises by tenants for many years prior to the commencement of this action.

4 III. Park avenue is a public street, and plaintiff, as appurtenant to said premises, has certain rights and easements therein.

IV. The defendant The New York and Harlem Railroad Company is the owner of the railroad and structures hereinafter mentioned. Said defendant, on or about April 1, 1873, leased its said railroad and structures to the defendant The New York Central and Hudson River Railroad Company for a term of four hundred and one years.

V. Defendants, for more than six years past, have maintained upon that portion of Park avenue which is subject to plaintiff's easements as aforesaid a railway in a depression or cut, with solid walls of masonry extending many feet above the surface of said portion of said avenue; at the present time said railway is, and for more than six years past has been, operated by trains drawn by steam engines; and under the said lease it is and has been maintained and operated, as aforesaid, for the benefit of both defendants.

VI. In or about April, 1893, defendants began constructing, and have continued to construct, and have in part erected, and have since maintained, upon that portion of Park avenue which is subject to plaintiff's easements, as aforesaid, a permanent elevated railway structure of iron and steel, supported by columns of iron and steeel, standing on pedestals of masonry, with foundations embedded in the soil of said avenue; said structure is a new, special, additional and continuing injury to the plaintiff.

VII. By reason of the said acts of the defendants the plaintiff's said premises have been deprived of light air, access, ventilation, privacy, stability, quiet and other rights, and the easements appurtenant to said premises, as aforesaid, have been and are appropriated by the defendants; and the value both of said premises and of the use and occupation thereof has been largely depreciated thereby, to the damage of the plaintiff one hundred and fifty thousand dollars.

VIII. Defendants threaten and intend to make extensive additions to said elevated railway structure, and to enlarge and strengthen the same, and upon completion thereof to operate thereon trains of cars drawn by steam engines.

IX. Said additions to and enlargement of said elevated railway structure and the running of trains thereon, as aforesaid, will, to a still greater extent, deprive said premises of light, air, access, ventilation, privacy, stability, quiet and other rights; and the easements appurtenant to said premises, as aforesaid, will be still further appropriated by the defendants; and still greater and additional consequential damages will be inflicted upon said premises; and the injuries, hereinbefore described, will be greatly increased and intensified.

X. The injuries complained of are, and will be, constant and continuous trespass, and to prevent a multiplicity of suits, and to afford plaintiff adequate relief, the equitable interference of this court is necessary; said acts of the defendants have been, and are, and will be without warrant of law, without consent of plaintiff, and without compensation to him.

Wherefore, the plaintiff asks judgment:

(1.) That the defendants may be enjoined from using said elevated railway structure and said depression, and from continuing both or either opposite the said premises; and from doing any acts with respect to said elevated railway structure, except to remove the same; or that the court shall determine the amount of damages to the fee value of said premises in consequence of the appropriation by defendants of plaintiff's said easements, as aforesaid, amounting, as the plaintiff alleges, to one hundred thousand dollars and over, and that, unless the defendants shall forthwith pay the same to the plaintiff, the defendants be enjoined from using the said elevated railway structure and depression, and from continuing the same opposite the said premises.

(2.) That the plaintiff may recover from the defendants his damages for the loss and injury sustained by him from the year 1890 down to the time of the trial of this action by reason of the wrongful action of the defendants, hereinbefore referred to, which damages the plaintiff alleges amount to at least the sum of fifty thousand dollars.

(3.) And that the plaintiff may have such other and further relief

in the premises as may be just and proper, with the costs of this action.

EZRA A. TUTTLE,
JAMES C. BUSHBY,
Plaintiff's Attorneys.

Office and post office address, 120 Broadway, New York city.

7 CITY AND COUNTY OF NEW YORK, *ss:*

Henry Muhlker, the plaintiff in the above-entitled action, being duly sworn, says: That he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matter- therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

HENRY MUHLKER.

Sworn to before me this 18th day of December, 1896.

CHRISTOPHER J. LANE,
Notary Public (75), *N. Y. Co.*

8 Supreme Court, New York County.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants.

First.

The separate answer of the defendant The New York and Harlem Railroad Company herein:

1. Admits the allegation of the complaint contained in the paragraph thereof numbered "I."

2. Denies any knowledge or information sufficient to form a belief as to each and every allegation of the complaint contained in the paragraphs thereof numbered "II.," "VII." and "IX."

3. Admits that certain portions of Park avenue are a public street, but denies any knowledge or information sufficient to form a belief as to each and every other allegation of the complaint contained in the paragraph thereof numbered "III."

4. Admits the allegation of the complaint contained in the paragraph thereof numbered "IV.," that this defendant The New York and Harlem Railroad Company is the owner of the railroad

9 extending from Forty-second street in the city of New York through the said Park avenue northerly to Chatham, and that heretofore and on or about April 1, 1873, this defendant leased its said railroad, and all structures and appurtenances thereof, to the

defendant The New York Central and Hudson River Railroad Company, but for the full purport and effect of the said lease this defendant begs leave to refer to the said lease with the same force and effect as if the said lease, or a copy thereof, were hereto annexed and formed a part of this answer.

5. Denies the allegation of the complaint contained in the paragraph thereof numbered "V." that the defendants for more than six years past have maintained upon that portion of Park avenue, which is subject to plaintiff's easements, a railroad, with solid walls of masonry extending many feet above the surface of said portion of Park avenue, but admits and alleges that defendants have for more than twenty years prior to the commencement of this action maintained a railroad over, through and upon a strip of land between Forty-second street and the Harlem river, and in front of the premises described in the complaint, on each side of which is a public street known as Park avenue, and that said railroad over certain portions of said strip of land is constructed in a depression or cut, and that said railroad is, and for many years past has been, operated by trains drawn by steam engines; that under the said lease from this defendant to the defendant The New York Central and Hudson River Railroad Company, said railroad has been maintained and operated by the defendant The New York Central and Hudson River Railroad Company, pursuant to the statutes of the State of New York in such case made and provided, and in accordance with the terms of the said lease.

6. Denies each and every allegation of the complaint contained in the paragraph thereof numbered "VI."

7. Denies the allegation of the complaint contained in the paragraph thereof numbered "VIII.," that this defendant threatens and intends to make extensive additions to said elevated railway structure and to enlarge and strengthen the same, and upon completion thereof to operate trains of cars drawn by steam engines.

8. Denies each and every allegation of the complaint contained in the paragraph thereof numbered "X."

9. Denies any knowledge or information sufficient to form a belief as to each and every allegation of the complaint not hereinbefore or hereinafter specifically controverted or admitted.

Second.

For a further, second and separate defense this defendant alleges, upon information and belief, that prior to the commencement of this action, and on or about the 31st day of October, 1891, Henry Muhlker, then the alleged owner of the premises described in the complaint herein, executed, duly acknowledged and delivered to Alice S. H. Davies, two mortgages upon portions of the premises described in the complaint herein to secure the payment of large sums of money, to wit, the sum of $20,000.00 and the sum of $15,000.00 respectively, with interest; that the said mortgages were duly recorded in the office of the register of the city and county of New York, and

that the same remains undischarged of record, and that the
11 owner thereof has not been made a party to this action, and that on or about the 24th day of October, 1891, Henry Muhlker, then the alleged owner of said premises, executed, duly acknowledged and delivered to Alice S. H. Davies, a mortgage upon the remaining portion of said premises to secure the payment of a large sum of money, to wit, the sum of $20,000.00, with interest; that the said mortgage was duly recorded in the office of said register, and that the same remains undischarged of record, and that the owner thereof has not been made a party to this action.

For a further and separate defense, that on or about the 28th day of April, 1892, the plaintiff herein commenced an action as plaintiff in the supreme court, New York county, by Joseph Ullman, his attorney, against the defendants, for an injunction and damages, by reason of the defendants' railroad structure and the operation of trains thereon in Park avenue opposite that portion of the premises described in the complaint situated on the northwest corner of Park avenue and 115th street, having a frontage of 77 feet on Park avenue and of 26 feet on 115th street; that the said action is at issue and pending and undetermined; that the relief sought in said action, and the alleged facts upon which such claim for relief is founded, are in part identical with the plaintiff's claim for relief and with the alleged facts upon which such claim is founded in this action.

Third.

For a further third and separate defense the defendant The New York and Harlem Railroad Company alleges upon information and belief:

That pursuant to the provisions of an act of the legislature
12 of the State of New York, entitled "An act relative to improvements, touching the laying out of streets and roads in the city of New York and for other purposes," passed April 3d, 1807, and known as chapter 115 of the Laws of 1807, a map or plan exhibiting the public streets and avenues of the city of New York was duly made and filed April 1, 1811, exhibiting among other avenues, Fourth avenue, of the width of one hundred feet, extending from the southerly side of the Harlem river to and below Forty-second street.

That by the provisions of an act of the legislature, entitled "An act to incorporate the New York and Harlem Railroad Company," passed April 25th, 1831, and known as chapter 263 of the Laws of 1831, the defendant The New York and Harlem Railroad Company was incorporated and was authorized, among other things, to construct a railroad from any point on the north bounds of Twenty-third street to any point on the Harlem river, between the east bounds of the Third avenue and the west bounds of the Eighth avenue, and that pursuant to the requirements of said act the defendant The New York and Harlem Railroad Company, duly located the route of said railroad and made a survey of such loca-

tion and filed a map thereof in the register's office of the city and county of New York on the 22d day of October, 1831, the said map having been approved by a joint resolution of the common council, approved by the mayor, October 11, 1831, declaring their approval of the map and of the route of said railroad indicated thereon; that said railroad, as located as aforesaid, occupied a strip of land twenty-four feet in width extending from Twenty-third street to the Harlem river, the centre line of said strip coinciding with the centre line of Fourth avenue as laid down on said map, filed April 1, 1811.

That subsequently, and on the 22d day of December, 1831,
13 the mayor approved an ordinance passed by the board of aldermen on the 16th day of December, 1831, and by the board of assistants on the 19th day of December, 1831, granting permission to said New York and Harlem Railroad Company to construct a railroad from Twenty-third street to the Harlem river, along Fourth avenue, in conformity with said map, and that said company, by articles of agreement executed January 9th, 1832, duly covenanted to perform all the conditions and requirements contained in said ordinance.

That after the incorporation of the defendant The New York and Harlem Railroad Company, and prior to the acquisition by the city of New York of any title to any part of Fourth avenue, north of Forty-second street, the defendant The New York and Harlem Railroad Company acquired title in fee for the purpose of constructing and operating its railroad thereon to a strip of land extending southerly from the southerly line of the Harlem river to Forty-second street, a portion whereof is in front of the premises described in the complaint, of the width of twenty-four feet, situate within the exterior lines of Fourth avenue, as designated on said map or plan, the centre line thereof coinciding with the centre line of said Fourth avenue, and also the right to slope any embankment or excavation of its railroad structure to the exterior lines of the said Fourth avenue; and that many years prior to the acquisition of any title by the city of New York to any part of Fourth avenue, the defendant The New York and Harlem Railroad Company, had constructed its railroad structure and had in operation its railroad upon the same, and its roadway acquired as aforesaid, and upon, along, above and
below the grade of the adjacent land, and continued the op-
14 eration of its railroad upon its railroad structure, as so located and constructed, until the changes required by the provisions of chapter 880 of the Laws of 1867, and by the provisions of chapter 702 of the Laws of 1872, as hereinafter set forth, were successively made.

That pursuant to the provisions of an act of the legislature, passed upon the memorial of the mayor, aldermen and commonalty of the city of New York, therefor, and entitled "An act to alter the map or plan of the city of New York," passed April 27th, 1837, and known as chapter 274 of the Laws of 1837, said Fourth avenue was widened to the width of one hundred and forty feet, and the said widening

from one hundred to one hundred and forty feet was by reason of the location and characteristics of the railroad and railroad structures theretofore built by the defendant The New York and Harlem Railroad Company, extending between Forty-second street and the Harlem river, and was for the purpose of giving an avenue of the necessary width for the increasing needs and population of the city of New York.

That the aforesaid acquisition of title by said defendant, The New York and Harlem Railroad Company, with the right to slope any embankment or excavation for its railroad structure to the exterior lines of said Fourth avenue, at that time one hundred feet in width as aforesaid, and the aforesaid construction by this defendant The New York and Harlem Railroad Company, of its railroad structure, and the aforesaid operation of its railroad upon the same and its roadway, was many years prior to the alleged acquisition by the plaintiff of title (if he acquired any title) to the premises described in the complaint, and to the erection of any building or buildings on said lands, and such acquisition of title, right of construc-
15 tion and operation of said railroad was pursuant to and by authority of said act of incorporation of said defendant The New York and Harlem Railroad Company, and of the acts amendatory thereof and supplemental thereto, and with the consent and acquiescence of the predecessor or predecessors in title (if the plaintiff has any) of the plaintiff.

That pursuant to the provisions of section six of an act of the legislature entitled, "An act to amend an act entitled 'An act relating to the New York and Harlem Railroad Company,' passed May 7, 1840, and the acts amending the same," passed March 29th, 1848, and known as chapter 143 of the Laws of 1848, the New York and New Haven Railroad Company (now known as the New York, New Haven and Hartford Railroad Company), a railroad corporation organized under the laws of the State of Connecticut, acquired from said defendant The New York and Harlem Railroad Company, the right to run the cars of the said New York and New Haven Railroad Company upon the tracks of said defendant The New York and Harlem Railroad Company, from a point of junction near Williams bridge, to and into the city of New York, and did, and ever since the year 1848 has, run its cars and trains upon the railroad of said defendant The New York and Harlem Railroad Company, from said point of junction to and along and upon said tracks from the southerly side of the Harlem river to Forty-second street.

That by proceedings instituted by the mayor, aldermen and commonalty of the city of New York, in or about the year 1850, for the opening of Fourth avenue (now known as Park avenue) from Thirty-eighth street to the Harlem river, resulting in an order of confirmation entered October 29th, 1853, the said city assumed to ac-
16 quire title to the land between the exterior lines of Fourth avenue from Thirty-eighth street to the Harlem river, subject, nevertheless, to all the rights of the defendant The New York

and Harlem Railroad Company, to maintain and operate its said railroad in said avenue.

That on the 10th day of May, 1867, the legislature passed an act entitled "An act for the protection of persons traveling upon Fourth avenue in the city of New York," and known as chapter 880 of the Laws of 1867, which in terms required and provided that the defendant The New York and Harlem Railroad Company should do certain work and perform certain acts, and among other things, that it should erect retaining walls upon the sides of its railroad below Ninety-second street, and between Seventy-eighth and Eighty-eighth streets, surmount said retaining walls with iron railings, and arch over its roadway from Eighty-eighth street to Ninety-second street, and that the city of New York should pay to the defendant The New York and Harlem Railroad Company one-half of the expense thereof, and that the filling in and grading about the said arch should be done by the city of New York, at its sole expense; and this defendant alleges that all the work and acts required to be done by said last mentioned act were duly performed.

That on the 14th day of May, 1872, the said legislature passed an act entitled "An act to improve and regulate the use of Fourth avenue in the city of New York" and known as chapter 702 of the Laws of 1872, whereby an established statutory grade and roadway between Forty-fifth street and the Harlem river were provided for the said railroad of the defendant The New York and Harlem Railroad Company, and whereby said defendant was required to con-
17 struct such viaducts, foot and road bridges over the same and such excavations and tunnels under the same, with openings for proper ventilation, as should be required by the plans and specifications of a board of engineers appointed by said act to execute, direct and superintend the said improvement; and also requiring one-half the cost of said improvement to be paid by the city of New York. That said improvement was accordingly carried out and the requirements of said act fully complied with and the railroad structure mentioned in the complaint as existing in front of the premises described in the complaint prior and up to the month of April, 1893, was constructed and has since been maintained and operated by the defendants pursuant to said last mentioned act.

That on the first day of April, 1873, said defendant The New York and Harlem Railroad Company leased all of its railroad from Forty-second street northwardly to the defendant The New York Central and Hudson River Railroad Company for a term ending April 1st, 2274, and that the said defendant The New York Central and Hudson River Railroad Company entered into possession and is now in the sole occupation and enjoyment of the said demised premises.

That on the 19th day of April, 1892, the said legislature passed an act entitled, "An act to regulate, improve and enlarge Park avenue above 106th street, in the city of New York, and providing for the passage of intersecting streets under the railroad structure of the New York and Harlem Railroad Company, and for the elevation of

said railroad structure, and for changing the grade of said railroad, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary by
18 reason of such change in structure and grade and increased elevation of bridges, and for other purposes," and known as chapter 339 of the Laws of 1892; that said act was duly amended by an act of said legislature, passed May 8th, 1894, and known as chapter 548 of the Laws of 1894, and was also further amended by an act of said legislature passed May 13th, 1896, and known as chapter 594 of the Laws of 1896.

That under and pursuant to the provisions of section 13 of said act, chapter 339 of the Laws of 1892, the board therein designated as "the board for the Park avenue improvement above One hundred and sixth street," was duly appointed by the mayor of the city of New York, on or prior to the 29th day of April, 1892, was duly organized as required in said act on that date, and thereupon proceeded to and took entire charge and control of the improvement directed in said act, and still has entire charge and control of the same; that pursuant to the authority vested by said act as amended as aforesaid, and in obedience to its explicit directions, the said board entered into and executed certain contracts with various parties for the construction and carrying out of said improvement, according to certain plans prepared by said board, approved by the commissioner of public works of the city of New York, and filed in the office of the comptroller of the city of New York, and that all the structures described in the complaint, including all temporary structures, required in the construction of said improvement, or necessary for the operation of trains during the making of said improvement, have been erected by such contractors under the sole supervision and control of said board, and in part at the expense of the mayor, aldermen and commonalty of the city of New
19 York, as required by said act as amended as aforesaid, and that all the provisions of said chapter 339 of the Laws of of 1892, as amended, have been and are being duly carried out and executed.

That all the changes in the original railroad bed and structures of the defendant The New York and Harlem Railroad Company, which have been or are being made, including all temporary structures, were and are necessary and requisite in order to carry out the provisions of the said acts, and were necessary and required for the purpose of and in order to regulate, improve and enlarge Park avenue in accordance with the provisions of the said acts, and that the defendant The New York and Harlem Railroad Company, has not operated any trains on said structure, or any part of it, temporary or otherwise.

Fourth.

For a further fourth and separate defense the defendant The New York and Harlem Railroad Company alleges, upon information and

belief, that for the pretended injuries or causes of action alleged in the complaint the plaintiff has a complete and adequate remedy at law, and that the plaintiff has no right to invoke the equitable interference of this court.

Fifth.

For a further fifth and separate defense the defendant The New York and Harlem Railroad Company alleges that the pretended cause or causes of action set forth in the complaint herein did not, nor did either of them, accrue to the plaintiff herein or to — predecessor or predecessors in title within twenty years next preceding the commencement of this action.

Sixth.

For a further sixth and separate defense the defendant The New York and Harlem Railroad Company alleges that the pretended cause or causes of action set forth in the complaint herein did not, nor did either of them, accrue to the plaintiff herein or to — predecessor or predecessors in title within ten years next preceding the commencement of this action.

Seventh.

For a further seventh and separate defense the defendant The New York and Harlem Railroad Company alleges that the pretended cause or causes of action set forth in the complaint herein did not, nor did either of them, accrue to the plaintiff herein or to — predecessor or predecessors in title within six years next preceding the commencement of this action.

Eighth.

For a further eighth and separate defense the defendant The New York and Harlem Railroad Company alleges:

That it entered into possession of that part of Park (formerly Fourth) avenue in front of, or adjacent to, the premises claimed to be owned by the plaintiff, which is now and heretofore has been occupied by the railroad and railroad structure of the defendant The New York and Harlem Railroad Company, under a claim of title, exclusive of any other right, founding such claim upon a written instrument or instruments as being a conveyance or conveyances of said premises or of the right, franchise and easement to construct, maintain and operate railroads thereon, and that there has been a continued occupation, possession and use of the said franchises, rights and easements included in said written instrument or instruments, or of some part thereof, by the defendant The New
21 York and Harlem Railroad Company, and the defendant The New York Central and Hudson River Railroad Company, under said lease, for twenty years next preceding the commencement of this action, under the same claim.

Wherefore, the defendant The New York and Harlem Railroad Company demands that the complaint be dismissed, with costs.

FRANK LOOMIS,
Attorney for the Defendant The New York and Harlem Railroad Company.

Office and post office address, room 10, Grand Central depot, 42d St. and Vanderbilt Ave., New York city, N. Y.

COUNTY OF NEW YORK, *ss:*

Edward V. W. Rossiter, being duly sworn, says that he is the treasurer of The New York and Harlem Railroad Company, the above-named defendant; that the foregoing answer is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

E. V. W. ROSSITER.

Sworn to before me this 23d day of March, 1897.

H. B. DWYER,
Notary Public, New York County.

The separate answer of the New York Central and Hudson River Railroad Company contains substantially the same allegations as the separate answer of the New York and Harlem Railroad Company.

22 New York Supreme Court, County of New York.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Defendants. } Decision.

The issues in the above-entitled action having been tried at a special term of this court, held by the Hon. David Leventritt, justice, in the county court house of New York county, on the 8th and 10th days of October, 1900, and the respective parties having appeared by counsel, and the evidence presented having been duly heard and considered, the court makes this decision, stating concisely the grounds upon which the issues herein are decided, as follows:

First. That the plaintiff is, and since the year 1888 has been, the owner of a lot of land in the borough of Manhattan, city of New York, being situated on the northwesterly corner of Park avenue and 115th street, and having a frontage of 76 feet and 10 inches on said avenue, and of 26 feet on said street; that the plaintiff about the

year 1891 erected on said lot a five-story brick building, adapted for stores and dwelling purposes, and covering nearly the entire
23 lot aforesaid; and that the plaintiff has, and during the periods of his ownership, as aforesaid, had, as appurtenant to his said lot and building, certain easements of light, air, and access in and over said Park avenue in front of said premises.

Second. That the defendant The New York and Harlem Railroad Company is, and during all times herein mentioned was, the owner of the railroad and railroad structures, hereinafter described, in Park avenue in front of the plaintiff's said premises; that the defendant The New York Central and Hudson River Railroad Company is the lessee of said railroad and structures, under a lease dated April 1st, 1873, for a term of 401 years from said date; that said railroad prior to the year 1872 was operated on two tracks laid upon the surface of said avenue and along the centre thereof in front of said premises.

Third. That pursuant to chapter 702 of the Laws of 1872, certain changes were made in said railroad in front of said premises, between the years 1872 and 1878, whereby the number of tracks were increased from two to four; that said tracks were laid along the centre of said avenue, and at the south line of said premises were at the surface of said avenue and at the north line of said premises said tracks were laid in a trench about 5½ feet in depth below the surface of said avenue; that said railroad was bounded on both sides by masonry walls about 3 feet high above the surface of said avenue in front of said premises, cutting off access across said avenue immediately in front of said premises; that said defendant The New York Central and Hudson River Railroad Company in the year 1878 began to operate its trains over said last-mentioned railroad in front of said premises, and continued to maintain
24 and operate said railroad from said year down to February 16, 1897.

Fourth. That pursuant to chapter 339 of the Laws of 1892, there was constructed along Park avenue, in front of plaintiff's said premises, between April, 1893, and March, 1896, a new permanent elevated railroad structure of iron and steel; that said railroad in front of plaintiff's said premises is about 59 feet wide and consists of four tracks laid on a solid roadbed having a mean elevation of about 31 feet above the surface of said avenue, which roadbed is girded along the sides and in the centre by solid iron girders each 7 feet and 4 inches high, and is supported by iron columns, of which there are six directly in front of plaintiff's said premises; and that the work of constructing said permanent elevated railroad structure was done under the supervision of a board created by said act.

Fifth. That the defendant The New York Central and Hudson River Railroad Company laid the tracks on said permanent elevated railroad structure about March, 1896, and from said date down to February 16th, 1897, operated thereon in front of said premises trains of cars drawn by steam engines for the carriage of freight and material used in the construction of said structure, for which service

said defendant was paid; that said defendant on February 16th, 1897, began to operate regularly and permanently upon said permanent elevated railroad structure in front of plaintiff's said premises its passenger trains, drawn by steam locomotives.

Sixth. That the rental and fee values of the plaintiff's said premises were damaged by the work of constructing said permanent
25 elevated railroad structure and by the existence of the same from April, 1893, to March, 1896; also by said structure and the operation thereon of trains, as aforesaid, from March, 1896, to February 16, 1897, but that neither of said defendants is liable for such damage.

Seventh. That the said permanent structure and the operation by said defendant The New York Central and Hudson River Railroad Company of passenger trains thereon since February 16th, 1897, are and have been a continuous trespass upon the plaintiff's easements of light and air appurtenant to his said premises, hereinbefore described as having a frontage of 76 feet and 10 inches on said Park avenue and a depth of 26 feet on 115th street; that solely in consequence of said trespass, and aside from any other causes, the rental and usable value of said premises was depreciated from February 16th, 1897, down to October 10th, 1900, in the sum of fourteen hundred dollars ($1,400) below what said rental value would have been during said period, if there had been no change in defendants' said railroad in Park avenue in front of said premises pursuant to chapter 339 of the Laws of 1892; and that the fee value of said premises has been, and was on October 10th, 1900, depreciated thereby in the sum of three thousand dollars ($3,000) below what said fee value would have been on said date if there had been no change in defendant's railroad as aforesaid.

Eighth. That the said sums awarded as damages are over and above any and all benefits conferred upon said premises by the changes made pursuant to chapter 339 of the Laws of 1892, which said benefits result in part from improved access to said
26 premises afforded by said changes, and are offset against the damages to said premises caused by said changes.

Ninth. That the said sums awarded as damages are exclusive of the damages that would have been occasioned to plaintiff's premises by the maintenance and use of the defendant's railroad and structures had there been no change in the same pursuant to chapter 339 of the Laws of 1892, for which last-mentioned damages the defendants are not liable either jointly or severally.

Tenth. That this action was commenced by the plaintiff on January 7, 1897, that the plaintiff on April 28, 1892, began an action in this court against the defendants for an injunction and damages by reason of the defendant's railroad structure and the operation of trains thereon in front of the premises described herein, as said railroad existed and was operated on said date; and that said last-mentioned action was discontinued on February 27, 1900.

The court direct the entry of judgment in favor of the plaintiff, as follows:

I. That the defendants The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, and each of them, and their officers, agents and servants, and all persons claiming under or through them, be enjoined from maintaining, or in any way using, their permanent elevated railroad structure and its appurt-ances in front of the plaintiff's said premises, described herein, and be further enjoined to take down and remove the same from in front of said premises, but said injunction shall not be operative for twenty days after service upon defendants' attorneys of notice of entry of judgment herein.

II. That in case the said defendants shall, at least five
27 days before the said injunction shall become operative, tender for the purpose of execution by the plaintiff, and by all other persons having any title to, interest in or lien upon the said premises, a form of conveyance and release to said defendants of the plaintiff's easements of light, air and access appurtenant to said premises, taken by the maintenance and use of defendants' said permanent elevated railroad structure, as the same is now maintained and used; and in case the plaintiff and all other persons having any title to, interest in or lien upon the said premises, shall execute such conveyance and release, and shall tender delivery thereof to the said defendants; and in case the said defendants shall thereafter pay or tender to the plaintiff's attorneys the sum of three thousand dollars ($3,000) with interest thereon from October 10th, 1900, then the said injunction shall not in any manner become operative; and in case the plaintiff fails to deliver, or tender for delivery, said conveyance and release, executed, as aforesaid, the said injunction shall not in any manner become operative.

III. That the plaintiff, Henry Muhlker, recover judgment against the defendant The New York Central and Hudson River Railroad Company for the sum of fourteen hundred dollars ($1,400), with interest from February 16th, 1897, together with the costs of this action, to be taxed by the clerk, and an additional allowance of one hundred and fifty dollars ($150), but that execution to enforce said money judgment shall be stayed until the expiration of twenty days after notice of entry of the same.

IV. That either party may move at the foot of the judgment to be entered herein for further direction as to the enforcement of the same.

Dated November 2d, 1900.

DAVID LEVENTRITT, *J. S. C.*

28 Supreme Court, County of New York.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Defendants. } Judgment.

The issues in the above-entitled action having been tried at a special term of this court, held by the Hon. David Leventritt, justice, in the county court house of New York county, on the 8th and 10th days of October, 1900, and the respective parties having appeared by counsel, and the evidence presented having been duly heard and considered, and the court, after deliberation, having duly made and filed, on the 3d day of November, 1900, a decision in favor of the plaintiff and against the defendants, stating concisely the grounds upon which the issues herein were decided, and directing the entry of judgment as hereinafter stated; and the plaintiff's costs having been duly adjusted at $122.35, it is

Adjudged and decreed as follows:

I. That the defendant- The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad
29 Company, and each of them, and their officers, agents and servants, and all persons claiming under or through them, be enjoined from maintaining or in any way using their permanent elevated railroad structure and its appurtenances in front of the plaintiff's premises, being situated on the northwesterly corner of Park avenue and 115th street, and having a frontage of 76 feet and 10 inches on said avenue and of 26 feet on said street, and be further enjoined to take down and remove the same from in front of said premises; but said injunction shall not be operative for twenty days after service upon defendants' attorneys of notice of entry of judgment herein.

II. That in case the said defendants shall, at least five days before the said injunction shall become operative, tender for the purpose of execution by the plaintiff and by all other persons having any title to, interest in or lien upon the said premises, a form of conveyance and release to said defendants of the plaintiff's easements of light, air and access appurtenant to said premises, taken by the maintenance and use of defendants' said permanent elevated railroad structure, as the same is now maintained and used; and in case the plaintiff and all other persons having any title to, interest in or lien upon the said premises, shall execute such conveyances and release, and shall tender delivery thereof to the said defendants; and in case the said defendants shall thereafter pay or tender to the plaintiff's attorneys the sum of three thousand dollars ($3,000) with interest thereon from October 10th, 1900, then the said injunction shall not in any manner become operative; and in case the plaintiff

fails to deliver or tender for delivery said conveyance and
30 release, executed as aforesaid, the said injunction shall not in any manner become operative.

III. That the plaintiff Henry Muhlker recover of the defendant The New York Central and Hudson River Railroad Company the sum of fourteen hundred dollars ($1,400), with interest from February 16th, 1897, and the further sum of one hundred fifty dollars ($150), amounting to eighteen hundred sixty-one and 88/100 dollars, together with costs and disbursements taxed at one hundred twenty-two and 35/100 dollars, amounting in the aggregate to nineteen hundred eighty-four and 23/100 dollars, and that the said plaintiff have execution therefor; but said execution shall be stayed until the expiration of twenty days after notice of entry of judgment herein.

IV. That either party may move at the foot of the judgment to be entered herein for further direction as to the enforcement of the same.

Judgment signed and entered this 3d day of November, 1900.

WM. SOHMER, *Clerk*.

31 Supreme Court, New York County.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants.

Please take notice that the defendants, and each of them, hereby except to the decision filed herein on the 3d day of November, 1900, and to each and every part of the same.

Dated borough of Manhattan, New York city, November 5, 1900.

Yours, &c., IRA A. PLACE,
Attorney for Defendants.

Room 417, Grand Central station, borough of Manhattan, New York city, N. Y.

To Bushby & Berkeley, Esqs., attorneys for plaintiff, 120 Broadway, New York city, N. Y. William Sohmer, Esq., county clerk of New York county, county court house, N. Y. city.

32 Supreme Court, County of New York.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD Company *et al.*, Defendants.
Plaintiff's Exception to Decision.

SIRS: Please take notice that the plaintiff above named hereby excepts to the decision made herein by the Hon. David Leventritt,

justice, filed in the office of the clerk of New York county on November 3d, 1900, and to each and every part of said decision.

Dated New York, December 14, 1900.

Yours, &c., BUSHBY & BERKELEY,
Attorneys for Plaintiff.

Office and post office address, 120 Broadway, borough of Manhattan, New York city.

To William Sohmer, Esq., clerk of New York county. Ira A. Place, Esq., attorney for defendants.

33 Supreme Court, New York County.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILroad Company and The New York Central and Hudson River Railroad Company, Defendants.
} Notice of Appeal to Appellate Division.

Please take notice, that the defendants above named, and each of them, hereby appeal to the appellate division of the supreme court, first department, from the judgment in this action, entered and filed in the office of the clerk of the county of New York, on the third day of November, 1900, and from each and every part of said judgment.

Dated New York, November 17, 1900.

Yours, &c., IRA A. PLACE,
Attorney for Defendants.

Office and post office address, room 417, Grand Central station, borough of Manhattan, New York city, N. Y.

To Bushby & Berkeley, Esqs., attorneys for plaintiff, 120 Broadway, borough of Manhattan, New York city, N. Y. William Sohmer, Esq., clerk of the county of New York, county court house, borough of Manhattan, New York city, N. Y.

34 Supreme Court, County of New York.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILroad Company *et al.*, Defendants.
} Plaintiff's Notice of Appeal.

SIRS: Please take notice that the above-named plaintiff hereby appeals to the appellate division of the supreme court for the first department from the judgment of this court, herein entered in the

office of the clerk of the county of New York on the 3d day of November, 1900, and from each and every part of said judgment.

Dated New York, December 14th, 1900.

Yours, &c., BUSHBY & BERKELEY,
Attorneys for Plaintiff.

Office and post office address, 120 Broadway, borough of Manhattan, New York city.

To Wm. Sohmer, Esq., clerk of New York county. Ira A. Place, Esq., attorney for defendants.

35 Supreme Court, Special Term, Part VI.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY *et al.*, Defendants. } Opinion.

LEVENTRITT, *J.*:

In this case, following Lewis *vs.* N. Y. & H. R. R. (162 N. Y., 202), as to the legal principles involved, the fee damage to plaintiff's premises, situate at the northwesterly corner of Park avenue and 115th street (26 ft. x 76 ft. 10 in.), is assessed at $3,000, and the rental damage from the 16th day of February, 1897, to the date of trial at $1,400. An extra allowance of $150 is granted. Follow the form of decision and judgment entered in the Lewis case.

36 Supreme Court, New York County.

HENRY MUHLKER, Plaintiff, Respondent, and Appellant,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants, Appellants, and Respondents.

The issues thus joined were tried before the Honorable David Leventritt, justice, at a special term, part VI., without a jury, on the eighth and tenth days of October, 1900.

James C. Bushby, Esq., and L. M. Berkeley, Esq., appeared for the plaintiff.

Charles C. Paulding, Esq., and Thomas Emery, Esq., appeared for the defendants.

FREDERICK SONNENBURG, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to plaintiff's counsel:

I own property between 115th and 116th streets on the easterly side of Park avenue. My business is that of a merchant tailor.
37 My place of business is at the corner of Spring street and Broadway. I have owned the property on Park avenue

justice, filed in the office of the clerk of New York county on November 3d, 1900, and to each and every part of said decision.

Dated New York, December 14, 1900.

Yours, &c., BUSHBY & BERKELEY,
Attorneys for Plaintiff.

Office and post office address, 120 Broadway, borough of Manhattan, New York city.

To William Sohmer, Esq., clerk of New York county. Ira A. Place, Esq., attorney for defendants.

33 Supreme Court, New York County.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILroad Company and The New York Central and Hudson River Railroad Company, Defendants.
} Notice of Appeal to Appellate Division.

Please take notice, that the defendants above named, and each of them, hereby appeal to the appellate division of the supreme court, first department, from the judgment in this action, entered and filed in the office of the clerk of the county of New York, on the third day of November, 1900, and from each and every part of said judgment.

Dated New York, November 17, 1900.

Yours, &c., IRA A. PLACE,
Attorney for Defendants.

Office and post office address, room 417, Grand Central station, borough of Manhattan, New York city, N. Y.

To Bushby & Berkeley, Esqs., attorneys for plaintiff, 120 Broadway, borough of Manhattan, New York city, N. Y. William Sohmer, Esq., clerk of the county of New York, county court house, borough of Manhattan, New York city, N. Y.

34 Supreme Court, County of New York.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILroad Company *et al.*, Defendants.
} Plaintiff's Notice of Appeal.

SIRS: Please take notice that the above-named plaintiff hereby appeals to the appellate division of the supreme court for the first department from the judgment of this court, herein entered in the

office of the clerk of the county of New York on the 3d day of November, 1900, and from each and every part of said judgment.

Dated New York, December 14th, 1900.

Yours, &c., BUSHBY & BERKELEY,
Attorneys for Plaintiff.

Office and post office address, 120 Broadway, borough of Manhattan, New York city.

To Wm. Sohmer, Esq., clerk of New York county. Ira A. Place, Esq., attorney for defendants.

35 Supreme Court, Special Term, Part VI.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY *et al.*, Defendants. } Opinion.

LEVENTRITT, *J.*:

In this case, following Lewis *vs.* N. Y. & H. R. R. (162 N. Y., 202), as to the legal principles involved, the fee damage to plaintiff's premises, situate at the northwesterly corner of Park avenue and 115th street (26 ft. x 76 ft. 10 in.), is assessed at $3,000, and the rental damage from the 16th day of February, 1897, to the date of trial at $1,400. An extra allowance of $150 is granted. Follow the form of decision and judgment entered in the Lewis case.

36 Supreme Court, New York County.

HENRY MUHLKER, Plaintiff, Respondent, and Appellant,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants, Appellants, and Respondents.

The issues thus joined were tried before the Honorable David Leventritt, justice, at a special term, part VI., without a jury, on the eighth and tenth days of October, 1900.

James C. Bushby, Esq., and L. M. Berkeley, Esq., appeared for the plaintiff.

Charles C. Paulding, Esq., and Thomas Emery, Esq., appeared for the defendants.

FREDERICK SONNENBURG, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to plaintiff's counsel:

I own property between 115th and 116th streets on the easterly side of Park avenue. My business is that of a merchant tailor.
37 My place of business is at the corner of Spring street and Broadway. I have owned the property on Park avenue

since perhaps 1892. I know the premises on the northwest corner of 115th street and Park avenue. I should say my house is about the same distance from the railroad structure in Park avenue as the premises in suit, but on the opposite side of the street. I am familiar with the conditions of the railroad as they existed prior to the elevation of the defendants' tracks. I do not live in the house; at the same time I go there occasionally. I know what the physical conditions are.

Q. State what the physical effects are that you have noticed on your premises from the elevation of the defendants' tracks and the operation of trains thereon?

Objected to as immaterial, irrelevant and incompetent.
Objection overruled. Exception to defendants.

A. There is a great many. First off, it takes a good deal of light away from the premises—the apartments in the front. Then the dust and smoke is so that the party in the front cannot keep the windows open at all, not alone from the dust, but from the noise. Noise is the principal part. Sometimes, if a train runs in the afternoon or in the morning quick, it is so noisy that it awakens the children from sleep, and often prevents us from renting the flats. Of course, I have had experience myself and tried to rent the flats in every way, but the railroad passes there, and it was so noisy that it interfered with our conversation, and I had to keep quiet until the trains passed.

Q. Where does the elevated structure come with reference to your apartments—on a level with what floor?

Objected to as immaterial, irrelevant and incompetent.
38 Objection overruled. Exception to defendants.

A. About the third floor.

Q. Do you know where it comes with reference to the plaintiff's house?

A. I have not been inside of his house, but I should say—my house is a little bit higher, I think. I think at mine it is very near the fourth floor, though, and his comes a little lower. My house is about opposite the plaintiff's premises, so that the structure comes about the same. I think my house goes up between 115th and 116th streets, and it is a little higher there. The structure is in front of some of the plaintiff's apartments and in front of some of mine.

Q. Will you state whether or not the passengers on the cars of the defendants' trains can look into the windows of your rooms?

Same objection, ruling and exception.

A. I have had complaints about that many times. It is not very pleasant to have them look in. I have noticed as to the vibration of my building when trains pass. When a train passes it jolts sometimes. If you sit on a chair you can see the movement in the mirror—not exactly a move, but it shakes.

There was no interference with my light from the passenger trains when they were run in the trench; passengers could not then look into my window; I did not notice any vibration of the building then, nor any cinders, dust or smoke in the upper apartments. We had a little smoke occasionally. It was according to what direction the wind comes from. If we had a window open it might have been brought in; but I had no trouble with the light, and no noise, and nothing at all, because it did not interfere with anything.

39 Cross-examination—In answer to defendants' counsel:

I have a suit pending against these companies for damages and Mr. Bushby is my attorney.

I have owned that property since 1892 or 1893—I really could not tell. I do not live there; I do not live on Park avenue at all. I go to my property sometimes twice a week and sometimes I may not go there in a week or two weeks. The last time I was there was this morning; I always go there to collect the rents of the house, because I have no agent. This morning I was there only a short time, because I had to be here in court. I stay there sometimes for half a day when I have men there to paint. Besides, some time ago I put a brother of mine in the place in one of the apartments, and I have stayed there a whole evening, and have been there nights sometimes until 10 or 11 o'clock. I have observed the noise when I have been there in the evening. The noise was very great just at the time the trains passed.

Q. Was that the chief objection?

A. Well, there was a great many—the light. Parties living in the house objected to a great many things. Because of the dust they could not keep the windows open, and the darkness, and then the noise awakened the children from sleep. The dust got in all of the floors except the ground floor. This is dust from the engines. I did not examine the dust. I saw dust get in there; it is dark; what it comes from I don't know, and what it is I did not examine. It don't come in in such lumps that I can examine it to see what — is.

The trains on the structure come up to my third story. Smoke does not always come in the apartments from the trains. I have seen the smoke stain the windows. When the windows are
40 open the smoke gets in the upper apartments. In the old structure I got smoke in my apartments. The smoke went up, too, just the same. I did not get that in all the apartments. We had a little smoke before, too, on the old structure, occasionally, but not as much as now. I cannot explain why, but I suppose that is on account that the trains run open now and more dust comes in now.

MARIA F. MAXWELL, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to plaintiff's counsel:

I live at 1626 Park avenue, in plaintiff's house, on the northwest corner of Park avenue and 115th street. I moved in there the eighth day of November, 1896. I occupy the top floor south, and have continued to occupy that apartment since I moved in the premises. When I first took the apartment I paid $17.00 a month rent. When I moved in there there was an iron railroad structure in front of the premises, and there was a temporary structure of wood. I do not think trains ran on the structure until two or three months after. Construction trains were run on there then.

It is stipulated that regular trains commenced to run on this structure February 16, 1897.

My rent was reduced by the plaintiff. When I had been there about three or four months I decided to move, and I spoke to Mr. Muhlker about it, and he reduced the rent $1 and I paid $16. At the time this reduction was made I spoke to Mr. Muhlker about the railroad structure in front of the premises.

Trains are now run on this structure in front of my apartments.

I have never noticed anything as to the effect of the structure
41 and the running of trains in reference to the light in my apartments. The structure is a little below my apartment. I have noticed as to dust and cinders.

Q. State what you have noticed.

A. Everything in the house gets all black flecked if we leave them out any length of time. Even the bedding is all covered with little black flecks. On Saturday night last we had some things out on the fire-escape, some celery, and the black flecks was ground into the celery, and all around in the roots of the celery.

The trains are certainly very noisy.

Q. What effect does that have upon conversation?

A. We close the windows. There are times when four trains pass, two in each direction, and certainly that makes a great noise, and we cannot hear each other speak, and then we raise our hands and make a motion to stop until the trains pass.

I pay $17 per month rent at the present time. I cannot really say how long I have paid $17, but it is not very long. It may be a year and it may be less. I cannot really say when it was raised.

Cross-examination—In answer to defendants' counsel:

I went in the apartment the day after election in November, 1896. The reduction by Mr. Muhlker of $1 in my rent was made two or three months after November, 1896, and that reduction continued until within the last year or so, or less.

I have lived on the top floor all the time I have been there. At

the time I went in there in November, 1896, the regular trains were running by this apartment house in the trench in the middle of the avenue, but there was a wooden temporary structure on the side right opposite.

42 Re-direct examination—In answer to plaintiff's counsel:

At the time this reduction in rent was made, I think the trains had started to run on the structure, but I am not positive on that point. That is my best recollection.

I never noticed if passengers in the trains can look into my windows, but I suppose they can.

Q. At the time the reduction in rent was made by Mr. Muhlker, as you have testified, state what, if anything, you said to him in reference to the structure and running of trains thereon.

Objected to by defendants' counsel as immaterial, irrelevant and incompetent.

Objection overruled. Exception to defendants.

A. Well, I said I did not think the flat was worth what I was paying for it, there was so much dust and noise.

It is stipulated that this action was commenced January 7th, 1897.

It is also stipulated that the New York Central and Hudson River Railroad Company is the lessee of the railroad and structure on Park avenue in front of these premises under a lease from the New York and Harlem Railroad Company, for a term of 401 years from the 1st day of April, 1873.

It is stipulated that under the auspices of the board for the Park Avenue improvement, work was begun on this improvement in or about April, 1893, under a contract made by the board for the Park Avenue improvement with John J. Hopper.

43 CHARLES M. MOODY, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to plaintiff's counsel:

My business is that of life insurance. My office is at 149 Broadway. I was at one time a tenant in the premises on the northwest corner of Park avenue and 115th street. I occupied the third floor north. The apartments range north and south there. When I moved in there there was not an elevated structure in front of the premises, and in the fall of 1896, when we moved out, they had just got to moving the construction trains on top of the structure.

When I first went there I think I paid $22 per month rent. That was in 1891. When I moved out I paid $16. When I moved out I said something to Mr. Muhlker in reference to the presence of the railroad structure in front of my apartments.

Q. State what you said to Mr. Muhlker.

Objected to as immaterial, irrelevant and incompetent.
Objection overruled. Exception to defendants.

A. I said to Mr. Muhlker that the noise would be very great in future—it had been very bad in the past with the old structure, but the noise had increased to such an extent that it would be impossible to live there with any degree of comfort, and, although the price of the rents was perfectly satisfactory, my wife would not submit to staying there, and so I told Mr. Muhlker that I would move out, and that was the reason I moved.

44 JOHN B. GERETY, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to plaintiff's counsel:

I am in the plumbing business. I am a tenant in the premises on the northwest corner of Park avenue and 115th street, and Mr. Muhlker is my landlord. I occupy the small northerly store in the premises, and pay $18.00 a month rent.

I have noticed very plainly the elevated structure in front of my store, and the physical effect of the operation of trains upon it.

Q. State what you have noticed?

A. In the first place, the noise is something so that you cannot stand it hardly. You cannot hear a word said in my place when a train is going by and for sometime before it reaches there, and if you are talking to anybody you have got to stop and wait until the train goes by. In the afternoon from about four or half-past they seem to run quite a number of trains, and then you cannot have any conversation in my place at all with anybody. The dust and dirt is something fierce from it at times. The structure does not take off so much light as the trains passing by. If you are writing at the desk, and a train passes, it will shade the light right off you.

I was familiar with the conditions before the elevation of the structure. Then they were run in the cut down below. At that time I did not occupy the store on Park avenue; I was about sixty feet off Park avenue then, on 116th street.

Cross-examination—In answer to defendants' counsel:

I have been in that store where I am now about six months. I did not pay $18.00 all that time. I have paid $18.00 about
45 three months. The rest of the time I paid $15.00. When I first went in there Mr. Muhlker wanted $18.00, but he agreed to give it to me for a few months for $15.00, until I saw whether I could stay there or not, and then the rent was raised to $18.00, and now I am paying $18.00—under protest, though.

Park avenue is opened and paved all the way across in front of my store. We get smoke from this structure now; a day like to-day quite a lot of smoke from it, as I noticed this morning. On a clear

day I do not notice it so much. I cannot say that I do not notice it at all. Sometimes we do, and sometimes we do not; but it is not so noticeable as on a heavy day. To-day is a damp day.

THEODORE F. SANDER, a witness called for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to plaintiff's counsel:

I live at 97 East 116th street. I have made measurements of the elevated structure in front of the premises in suit on the northwest corner of 115th street and Park avenue, and I have those measurements with me.

The present structure is made of steel and iron girders. The road-bed is solid; and is supported by steel columns which are embedded in the soil of the avenue. At the base of the columns there are blocks to protect the columns—wagon guards. Two girders run alongside of this structure, which are solid. The structure opposite the premises in suit was completed about September, 1895. My recollection is tracks were laid upon the structure in March, 1896. Construction trains were first run on the structure some time after the laying of the tracks; I believe it was in March. The grade of the present railroad in front of these premises rises from
46 110th to 116th street. The road-bed at this point was filled with rock ballast in September, 1899. There are six columns supporting this iron structure in front of plaintiff's house, and the distance of the columns from the house is 40 feet and 7 inches. The width of the structure from out to out of the columns is 59 feet. About 18 inches of the road-bed extends outside of those columns. The width of the sidewalk in front of the plaintiff's premises is 14 feet 7 inches.

Q. What is the width of the sidewalk on the east side?

Objected to by defendants' counsel as immaterial, irrelevant and incompetent.

Objection overruled. Exception to defendant.

A. 14 feet 7 inches. The distance between the curb lines in front of plaintiff's premises is 110 feet and 10 inches. The width of Park avenue between house lines is 140 feet.

Q. What is the width of Madison avenue at this point?

Same objection, ruling and exception.

A. 90 feet.

Q. And Lexington avenue at this point?

Same objection, ruling and exception.

A. 85 feet. I made these measurements personally. I have the dimensions of the columns supporting the present viaduct; they are 1 foot and 4 inches by 1 foot and 8 inches.

There are four tracks in front of these premises.

The dimensions of the wagon guards at the base of the iron columns are 3 feet by 3 feet. The width of the cars operated over this structure is 10 feet 4 inches. I have measured some of those cars. The length of the ties is 8 feet, and the gauge of the tracks is 4 feet 8½ inches. The height of the road-bed above the sur-
47 face of the avenue at the south side of the premises in question is 33 feet 3 inches at the top. The height of the road-bed above the surface of the avenue at the north line of these premises is 27 feet and 10 inches. A part of the structure, the handrails, is above the road-bed. Their height is 3 feet and 6 inches, and the total height of the handrails above the surface of the avenue is 36 feet and 5 inches. The height of the girders running along the side of the structure is 7 feet and 4 inches. There is also a girder along the centre of the same height.

I remember the railway as it existed in front of these premises prior to the elevation of the tracks. It consisted of four tracks and ran between the masonry walls about three and one-half feet high on each side of the avenue. The elevation of the tracks above the surface of the avenue on the south line of these premises was about 2 or 2½ feet. It struck the surface of the avenue with reference to these premises right at the north line of the premises. Along the northerly part of the premises it went into a kind of cut or tunnel that they had there; it started in right between 115th and 116th streets.

Q. Do you know if the present structure is in the line of the old structure?

A. Yes, sir. The wagon guard stands outside of the pillar. From out to out of the wagon guards it is wider than from out to out of the old parapet walls that were alongside of the old structure, so that the extreme width of the present structure is greater than that of the old structure.

Cross-examination—In answer to defendants' counsel:

I never measured the old structure. I measured the new struc-
ture last September. I do not know the width of the old
48 structure, but I know the width of the present structure. From outside to outside of the wagon guards it is 59 feet wide. That is from column to column I measured. I did not measure the column protectors on the bottom. I measured them separately, and they measured 3 feet by 3 feet, and I believe it is 18 inches that extends outside of the columns on each side. The dimensions of each of those columns at the bottom are 3 feet by 3 feet. I say the new structure is wider than the structure built under the laws of 1872, and my foundation for that statement is that while they were erecting that structure, they took the side wall off, and when they put in the columns, they put in the columns even with the side of the masonry wall, and after that, after the columns were in, they put in the column protectors. I did not measure that at

that time, but I saw them put it in. That was done in about 1894. They started it in 1893, and this must be some time afterwards while the structure was going on. I lived on the avenue and I used to go down and watch them; I kept no dates. I had no interest in watching them work, I was in the building business at that time, and naturally enough the work took my attention there. I have not measured cars on the structure there, but have measured them at 116th street, in the yard. I have measured passenger cars and Pullman cars. I measured just one car. The first car I could get to, and that was a palace car, and that is all the cars I measured. I only go by the measurement of that one car, that is all I can testify to. I did not measure the height or length of it, just the width.

The sidewalks are the same width on each side of Park avenue, 14 feet and 7 inches. There are six columns in front of these premises, I mean two rows across the street of three each. There are three columns from east to west for each girder. There are six all the way across. There are only two rows in front of the house, three from south to north and three in each row from east to west. The southern row of columns is located with reference to the southern line of this property about 25 feet north of the southern line of this property, and the other is located just on the northern end of this property.

I am familiar with the avenue as it was when the old structure was there; I lived there since 1888. I could not get across the avenue at 115th or 114th streets. I could get across at 116th street. There was a wagon bridge across 116th street which ran up above the grade of the street. Now the avenue is all open and paved the full width, 110 feet and 10 inches from curb to curb, and a wagon can drive from one side to the other, and you can drive through 115th street without going up to 116th street, and that has been so ever since the work was finished on the structure.

In the total height of the structure I included the height of the girder that was on it.

Plaintiff's counsel offered in evidence from the register's office, a deed from Benjamin L. Benson, to the mayor, aldermen and commonalty of the city of New York, dated November 19, 1825, recorded December 6, 1825, in Liber 196 of Conveyances, page 261:

Conveys the fee of certain strips of land laid out as streets on the map of the city of New York, and among them the fee of Park avenue, of the width of 100 feet, commencing at the centre line of the "old road to Harlem" and extending southerly for several hundred feet, the land conveyed being more particularly described as all those tracts of land, belonging to the party of the first part "over which the First avenue, the Second avenue, the Fourth avenue, * * * 115th street, and 116th street, run, pass, or extend, as said avenues or streets are laid out by the commissioners of streets and roads in the city of New York under and by virtue of the act entitled 'An act relative to improvements touching the laying out of streets and roads in the city of New York, and for

other purposes,' passed April 3, 1807, * * * to have and to hold all and singular the said pieces or parcels of land, hereditaments, and appurtenances, and every part and parcel thereof, above, in and by these presents released and confirmed, unto the said parties of the second part and to their successors, to the only proper use and behoof of the said parties of the second part and their successors forever, in trust, nevertheless, that the same be appropriated and kept open as parts of public streets and avenues forever, in like manner as the other public streets and avenues in said city are and of right ought to be."

DEFENDANT'S COUNSEL: I wish to object to the introduction of this deed upon the ground that no part of the property conveyed by it is in front of the premises in suit.

Objection overruled. Exception to defendants.

Deed received in evidence.

Plaintiff's counsel offered in evidence, from the comptroller's office, an original deed from Peter Poillon to the mayor, aldermen and commonalty of the city of New York, dated July 24, 1827, acknowledged July 24, 1827, and not recorded.

This deed conveys the fee of certain streets, and among them all that part of Fourth avenue extending northerly for several
51 hundred feet from the old road which leads from McGown's pass to Harlem, to the line of the land of S. Benson, deceased; all of which is more particularly described and laid down on a map made by J. F. Bridges, city surveyor, in September, 1826, of the lands formerly owned by Samson Benson and Benjamin Vredenburgh, deceased, and filed in the register's office of the city of New York, in trust that the same be left open as public streets for the use and benefit of the inhabitants of the said city forever.

DEFENDANT'S COUNSEL: I object to the introduction of this deed on the ground that it is an unrecorded instrument, and as immaterial, irrelevant and incompetent.

Objection overruled. Exception to defendants.

Deed received in evidence.

Plaintiff's counsel offered in evidence map No. 84, filed September 10, 1826, entitled "Map of property formerly belonging to S. Benson and B. Vredenburgh, deceased, in the twelfth ward of the city of New York." On this map Fourth avenue and the intersecting streets are represented as laid out in accordance with the map of the city of New York, as the latter was established under Laws of 1807, chapter 115. Fourth avenue is shown as of the width of 100 feet. The map represents lots laid off and numbered. Lot No. 489 is represented as at the northwest corner of Fourth avenue and 115th street. Lot No. 488 is just north of No. 489 and lot No. 487 is just north of No. 488. Each of the lots named has a frontage of 25 feet 2½ inches on Fourth avenue, and a depth of 110 feet. The "old road to
52 Harlem" is represented as running in a northeasterly direction, diagonally across Fourth avenue in front of the premises in suit.

Map received in evidence.

Plaintiff's counsel offered in evidence deed from Peter Poillon and Eliza, his wife, to Andrew V. Stout, dated June 31, 1827, recorded July 31, 1827, in Liber 220 of Conveyances, page 341.

Conveys "all those certain lots, pieces or parcels of land, situate, lying and being in the twelfth (late ninth) ward of the city of New York, and known and distinguished on a certain map made by J. F. Bridges, city surveyor, of lands formerly belonging to Samson Benson and Benjamin Vredenburgh, deceased, situate in the twelfth ward of the city of New York, which map bears date September, 1826, and is now on file in the office of the register of the city and county of New York, as lots numbered 488 and 489, bounded as follows, viz.: westerly by a line drawn parallel to the Fourth avenue on the westerly side thereof at the distance of 110 feet therefrom, northerly by a line drawn parallel to 115th street on the northerly side thereof at the distance of 50 feet 5 inches therefrom, southerly by 115th street, and southeasterly by the old road leading from Harlem to Kingsbridge, together with all and singular the rights, members, privileges, hereditaments and appurtenances whatsoever unto the said above mentioned and described premises in anywise appertaining or belonging. * * * And the said Peter Poillon, for himself, his heirs, executors, administrators, and assigns, doth covenant, grant, promise and agree to and with the said party of the second part,
53 his heirs and assigns * * * that the said party of the second part, his heirs and assigns, shall and may at all times hereafter peaceably and quietly have, hold, use, occupy, possess and enjoy the above granted premises, and every part and parcel thereof, with the hereditaments and appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said party of the first part, his heirs or assigns, or of any other person or persons whomsoever. * * * And also that the said parties of the first part, and their heirs, and all and every other person or persons whomsoever lawfully or equitably deriving any estate, right, title, or interest of, in, or to the hereinbefore granted premises, by, from, under, or in trust for him, her or them, shall and will at any time or times hereafter, upon the reasonable request and at the proper costs and charges in the law of the said party of the second part, his heirs and assigns, make, do and execute, or cause or procure to be made, done and executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law for the better and more effectually vesting and confirming the premises hereby intended to be granted in and to the said party of the second part, his heirs and assigns forever, as by the said party of the second part, his heirs or assigns, or his or their counsel learned in the law, shall be reasonably devised, advised or required."

Deed received in evidence.

It is stipulated that by certain mesne conveyances the title to the aforesaid lots numbered 488 and 489 was vested in Emily A. Verity.

54 Plaintiff's counsel offered in evidence, from the register's office, the record of a deed from Emily A. Verity, widow, to

Henry Muhlker, dated June 6, 1887, recorded June 7, 1887, in Liber 2047 of Conveyances, at page 338, the expressed consideration being $20,400, and the conveyance being subject to a mortgage amounting to $12,000. This deed conveys:

All that certain piece or parcel of land situated in the city of New York and bounded and containing as follows, to wit: Beginning at the northwesterly corner of Fourth avenue and 115th street, running thence northerly along Fourth avenue 50 feet 5 inches, thence westerly and parallel with 115th street 90 feet, thence northerly and parallel with Fourth avenue 50 feet 5 inches to the centre line of the block, thence westerly and parallel with 115th street 50 feet, thence southerly and parallel with Fourth avenue 100 feet 11 inches to the northerly side of 115th street, and thence easterly along 115th street 140 feet to the place of beginning.

Received in evidence.

Plaintiff's counsel offered in evidence deed from Peter Poillon and Eliza, his wife, to Joseph Smith Perry, dated June 21, 1827, recorded November 28, 1827, in Liber 228 of Conveyances at page 123.

"Conveys all those certain lots, pieces or parcels of land situate, lying and being in the twelfth (late ninth) ward of the city of New York, and known and distinguished on a certain map made by J. F. Bridges, city surveyor, of lands formerly belonging to Samson Benson and Benjamin Vredenburgh, deceased, situate in the twelfth ward of the city of New York, which map bears date Septem-
55 ber, 1826, and is now on file in the office of the register of the city and county of New York, as lots numbered 484, 485, 486, 487, which lots are designated on said map as parcel No. 35, and are bounded as follows, viz: Easterly in front by the Fourth avenue, westerly by a line drawn parallel to the Fourth avenue on the westerly side thereof at the distance of 110 feet therefrom, northerly by a line drawn parallel to 116th street on the southerly side thereof, at the distance of 50 feet 5 inches therefrom, and southerly by a line drawn parallel to 115th street at the distance of 50 feet 5 inches therefrom on the northerly side thereof, * * * together with all and singular the rights, members, privileges, hereditaments and appurtenances whatsoever unto the said above mentioned and described premises in any wise appertaining or belonging. * * * And the said Peter Poillon for himself, his heirs, executors, administrators, and assigns doth covenant, grant, promise and agree to and with the said party of the second part, his heirs and assigns * * * that the said party of the second part, his heirs and assigns, shall and may at all times hereafter peaceably and quietly have, hold, use, occupy, possess and enjoy the above granted premises and every part and parcel thereof, with the hereditaments and appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said party of the first part, his heirs or assigns, or of any other person or persons whomsoever. * * * And also that the said parties of the first part, and their heirs, and all and every other person or persons whomsoever, lawfully or equitably deriving any es-

tate, right, title or interest of, in, or to the hereinbefore granted
56 premises by, from, under or in trust for him, her, or them, shall and will, at any time or times hereafter, upon the reasonable request and at the proper costs and charges in the law of the said party of the second part, his heirs and assigns, make, do and execute, or cause or procure to be made, done and executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law for the better and more effectually vesting and confirming the premises hereby intended to be granted in and to the said party of the second part, his heirs and assigns, forever, as by the said party of the second part, his heirs or assigns, or his or their counsel learned in the law, shall be reasonably devised, advised or required."

Received in evidence.

It is stipulated that by certain mesne conveyances the title to the aforesaid lot numbered 487 was vested in one John B. Smith.

Plaintiff's counsel offered in evidence, from the register's office, the record of a deed from John B. Smith, and Bertha, his wife, to Henry Muhlker, dated June 22, 1888, recorded June 25, 1888, in Liber 2150 of Conveyances at page 134, the expressed consideration being $5,500, and the conveyance being made subject to a mortgage amounting to $4,000.

"This deed conveys all that certain lot of land, situate, lying and being in the city of New York and bounded and described as follows: Commencing at a point on the westerly side of Fourth avenue distant 50 feet and 5 inches northerly from the northwesterly corner of Fourth avenue and 115th street, running thence northerly along the westerly side of Fourth avenue 26 feet, thence westerly and
57 parallel with 115th street 90 feet, thence southerly and parallel with Fourth avenue 26 feet, thence easterly and parallel with 115th street 90 feet to the point or place of beginning, together with all the right, title and interest of the said parties of the first part of and to a strip of land 5 inches in width and 90 feet in depth adjoining the lot of land hereinbefore described on the northerly side thereof."

Received in evidence.

Plaintiff's counsel offered in evidence chapter 115 of the Laws of 1807; also chapter 86 of Revised Laws of 1813; also chapter 10 of the Laws of 1835; also chapter 55 of the Laws of 1837; also chapter 274 of the Laws of 1837; also chapter 339 of the Laws of 1892; also chapter 548 of the Laws of 1894.

The foregoing statutes are not printed in this case on appeal, but may be referred to and used by either party on any appeal herein, with the same force and effect as if so printed.

Plaintiff's counsel offered in evidence from the county clerk's office a petition verified April 15th, 1850, in proceedings entitled "In the matter of the application of the mayor, aldermen and commonalty of the city of New York, relative to the opining of Fourth avenue from 38th street to the northerly line or side of 135th street in the twelfth and eighteenth wards of said city;" the peti-

tion being verified April 15th, 1850, and having affidavits attached showing the publication and posting pursuant to law.

Received in evidence.

It is stipulated that this is offered simply to prove the widening of the avenue, being the proceedings taken to widen Park
58 avenue, from 100 feet to 140 feet, by adding 20 feet on each side.

Plaintiff's counsel offered in evidence rule for the appointment of commissioners of estimate and assessment in the same proceeding, appointing Samuel Jones, John M. Pinckney, and Richard J. Smith, commissioners; filed April 22, 1850. Also the oath of said commissioners, filed April 23, 1850.

Received in evidence.

Plaintiff's counsel offered in evidence order of the special term confirming the report of the commissioners in this proceeding; filed November 15, 1853.

Received in evidence.

HENRY MUHLKER, called as a witness in his own behalf, being duly sworn, testified as follows:

Direct examination—In answer to plaintiff's counsel:

I am the plaintiff in this action, and the owner of the premises on the northwest corner of 115th street and Park avenue, in this city. I purchased the vacant lots there. The considerations named in the deeds are correct. I have to add to those considerations the amount of mortgages to which the property was subject in order to get the value paid by me for the lots. I subsequently, in 1891, constructed houses on the lots. They were ready for occupancy about the first of the year 1892. I am a builder and have been in the building business for about 42 years. These houses were built under my instructions, and I paid for them. It cost me $27,000 to construct the corner house, which was the reasonable worth at that time. I have collected the rents from these premises con-
59 tinuously since the time that they were built up to the present time. The house on the corner is five stories and basement; with three stores underneath on Park avenue. The entrance to the apartments is on Park avenue, in the middle of the block. Above the ground floor the house is used for flats, which range north and south. In the north apartment there are five rooms and a bath, and in the south there are seven rooms and a bath. They have all improvements. In 1892 I received for the corner store $100 per month rent, and for the next store $28.00, and the next store $25.00. At the present time I receive $60.00 for the corner store, but I had to let it for $50.00 for some years before I got $60.00. For the store next to the corner I get $18.00. And for the store north of that, $18.00. For the second floor above the store, one flight up, south, seven rooms, I received $30.00 rent in 1892, and for the north I got $24.00. For the third floor, south, I received $1.00 less than I did for

the apartments under it, and that difference continued all the way up until you got to the top. The same rule applies to the north; I received $1.00 less for each apartment as you went up. At the present time for the second floor, south—half of the time it is empty—and I do not receive anything; but now I let it two months for nothing and I get $20, so it makes it up to about $15.00; I don't know exactly. For the north apartment, on the floor above the store, I receive $18.00 at the present time, and for the third apartment, on the south, I receive $19.00 at the present time, and on the north, $16.50. I receive no rent at the present time for the fourth apartment, south. It is empty. The schedule price is $18. I receive for the north apartment on that floor $16, and for the top floor, south, $17, and for the north $15. The rents which I collected in 1892 continued until about 1895.

60 I remember what the conditions were before the present structure was put up in front of my premises.

Under the old conditions they commenced to run trains on four tracks in front of my premises about 1878.

The old structure run down and under 116th street and in the tunnel, and 116th street had a bridge over it in those days, and the railroad ran underneath. The present structure is all an iron structure—big heavy iron—and it takes the light away.

I have observed as to the noise that you cannot hear your own words; sometimes we cannot talk to anybody there. You have got to go off in the street if you want to talk to anybody. I have certainly observed the vibration of my building from the operation of the trains. I did not notice any vibration when the trains were operated under the old conditions, and there was not so much noise then. I have observed cinders and smoke and steam from the operation of trains on the present structure. I have been upstairs, and I have a sample of the cinders here. I picked it up on the roof. I have to sweep the roof twice a week.

(Witness produced an envelope of cinders.)

I picked these cinders up personally from the roof of my house on September 27, 1900.

Plaintiff's counsel offered in evidence the envelope of cinders.

Objected to by defendant's counsel as immaterial, irrelevant and incompetent, and on the ground that there is no proof in the case that they were thrown there by the defendants' trains.

Objection overruled. Exception to defendants.

Received and marked Plaintiff's Exhibit A.

61 I own the houses adjoining on 116th street. They were constructed at the same time.

Cross-examination—In answer to defendants' counsel:

I heard Mr. Gerety testify here to-day that the structure did not interfere with the light in his store.

Q. Is it true what he said?

A. Yes, sir. The structure certainly interferes with light in my apartment house.

Q. Then Gerety did not tell the truth, did he?

A. Well, I heard something what he said about the light. I did not take any particular notice of what he said there.

I do not live in this house. I live at 18 West 114th street. It cost to build this house $27,000. I am my own agent and collect my own rents and set my own prices for the premises for rent. In 1892 I got $100 per month for the corner store. The tenant at that time was J. B. Fitzpatrick. He had a liquor store, and was there until 1893. While he was there he paid me $1,200 per year.

Q. That is what he was to pay, isn't it; how much did he actually pay you?

A. He paid me that.

Q. Isn't it a fact, now, that in 1892 you made a lease to Alex. Hinchey of that store at a rent of $1,000 a year?

A. The first year, but there was an additional—I guess Hinchey was there over a year, and he paid me while he was there.

Q. Isn't it a fact that on the 1st of August, 1892, you made a lease of that same store to Neal Kennedy for a saloon at the same rent, $1,000 per year?

A. Neal Kennedy bought out the first man, and I think he got a new lease.

Hinchey paid me as long as he was there, until he sold out to another man. I think Hinchey was there two months. The
62 lease will show that. From 1893 to 1895 my store was empty a little while. I am willing to swear that it was not empty two years. I do not remember who was there in 1895, but the lease was drawn up to somebody there. A man named Mitchell was there in 1895. He did not pay me so much a month as that, but he paid me rent. He bought it out from another man there. There was a drygoods store there in 1896 for four or five months, and they paid me $50 per month rent. After that there was a drug store in 1897, but he was not there long. He moved and sold out the things to another man. My store was not vacant for six months after he moved out, but he sold to another man. I cannot remember the name of the man who is there now. He pays $60 per month and paid the same last year. The year before he paid $50. He went in there at $50. He had it two years for $50, and $60 the next year, and that was the last year.

The third floor north in 1891 rented for $20, I think; that is next to the top.

Q. You testified $23 here?

A. $23 was underneath. The first floor, you understand, is a store, and one flight up—that is the difference there in the corner house; we haven't no first floor there; it is the second, third, fourth and fifth. I testified that in 1892 the rent for the third floor north was $23.

I remember Mr. Moody who was there in 1891, and he paid me $22 until 1895, I guess. The second floor south now brings me $20

per month, and that has been the price for that flat for a long time—for the last two years. That rent was until 1896. In 1897 and 1898 the rent for the second floor south was $18 and $20. In 1898 the rent was less than it was in 1897. In 1897 I rented the second floor south for $25. Then they moved out and they got it
63 less. Then it went down to $18. This was the first of August, 1898, E. Boyle, $18. That is the only entry there is here in my memorandum book. There is nothing here about 1897.

I have here in my memorandum book that the second flat north rented from 1892 to 1895, for $22. In 1897 I got $18 for this same flat.

(Witness withdrawn at the suggestion of plaintiff's counsel for the purpose of figuring out the rents for 1897.)

I have found out from my books that the rent of the second floor north, in 1897, was $18, and the third floor south was $19, and the third floor north $16.50; the fourth floor south $18; the fourth floor north $16; the fifth floor south $17, and the fifth floor north $15. The second floor south brought $30 in 1895, and that continued on, I think, between 1895 and 1896. I ask $18 for the fourth floor south to-day.

The mortgages that were on my property when I bought it are still there. The mortgage is $60,000, and is on the whole of the property—the three houses. It was given in 1892, at the time I had the building ready, but it has been changed since. The Greenwood cemetery owns it now. That is the only mortgage on the property, and it is a blanket mortgage covering all three of the houses.

Q. It does not separate?

A. Oh, yes, it is separated.

Q. Then what is the mortgage on this property on the corner; 26 feet on 115th street and 76 feet 5 inches on Park avenue?

A. $25,000.

JOHN H. WHITTLE, called as a witness for the plaintiff, being duly sworn, testified as follows:

Direct examination—In answer to plaintiff's counsel:

I am a real estate broker and appraiser, and my office is at
64 the southwest corner of 116th street and Park avenue, adjacent to the premises in suit. I have been in the real estate business about 17 years, and during that time I have bought, sold and appraised property in this vicinity. The principal field of my operations has been north of 90th street and east of Fifth avenue. During that time I have bought, sold, rented, leased and taken charge of property in the vicinity of the premises in suit, appraised property and made loans on them.

Q. How many appartments at the present time have you in your care or charge in this vicinity?

A. I have directly adjoining the property in question an apartment house containing 37 apartments and seven stores; corner of 118th street and Park avenue I have a house containing 13 apartments and one store; I had in 115th street, 25 feet east of Park avenue, two houses, 25 feet west of Park avenue two houses containing 20 apartments, I have four houses on the northwest corner of 112th street and Park avenue, I have a number of others further away.

I was familiar with the physical conditions of the railroad in front of this property prior to the elevation of the tracks of the defendant company.

Q. Will you describe those conditions?

A. The street was the same width as it is now, and the railroad at this point—that is, opposite the southerly line of this property, ran at or about the surface of the ground. From the southerly line of this property to the northerly line it gradually and rapidly went into a cut. When the trains reached the northerly line of this property in question, they were about one-half obscured from the sight of a person on the sidewalk. I remember when they commenced running on the original four tracks there, and to the best of my recollection it must have been in 1877 or 1878. I observed
65 the physical effect of the operation of trains under the old conditions upon the property on Park avenue. At this point the trains were at or about the level of the ground, and partly covered up as they proceeded northerly. There were some cinders, smoke, &c., thrown and cast upon the property, the sidewalks and probably more or less upon the first story. There was little or no obstruction to the light. There was little or no vibration. The apartments above the grade were of but very little less value than those situated on parallel avenues.

I have observed the operation of trains on the present structure and the physical effects of that operation upon the neighboring property. The trains run above the level of the fourth story of this property and the structure and the trains passing the property obscure the light. The steam emitted by the trains produces flashes of light in the apartments. The smoke and cinders are cast upon all the floors and in the windows of all the apartments in the building. I have observed these drippings at both of the streets at each end of the premises. At 116th street and at 115th street I have observed it very frequently, and in some cases to my own personal sorrow, as it destroyed my own clothing. The vibration is very much increased. There is considerable increase in the noise. The trains running opposite the upper portion of the buildings, the noise has been increased considerably and the structure gives more or less noise.

Since the elevation of the tracks the privacy of the rooms opening on Park avenue has been entirely destroyed unless you close the window and cover it up with a heavy shutter. Before the elevation of the tracks it was not injured in any way, as it was impos-

sible to see into the windows of the apartments from the trains
66 to any more extent than you would from the sidewalk on the opposite side of the street.

In 1892 Park avenue in this vicinity was very well built up. At the present time there is little or no change, but very few buildings have been erected on Park avenue from 110th street to 125th street since 1892. I believe one or two buildings have been destroyed or taken down.

Madison avenue in 1892, from 110th to 116th street, was well built up, and from 116th street to 120th street it was very sparsely built upon, and from 120th to 125th street it was fairly well built upon. Without examining it specially for this purpose, I should say that Madison avenue at the present time, as compared with 1892, every lot is built upon from 110th street to 125th street. There have been a great many houses constructed since 1892—all there possibly can be—to the best of my recollection.

Lexington avenue in 1892, from 112th street to 125th street, was fairly well built up. There have been comparatively quite a large number of buildings built upon it since 1892. There is no elevated railroad on either Lexington or Madison avenue. The grade of the defendants' railroad in front of these premises ascends, going north. Trains going north do considerable puffing as they go up the grade until they reach 116th street and trains coming south do puffing until they reach 116th street.

I have observed the volume of business and traffic on Park avenue, both in 1892 and at the present time. There is considerably less traffic on Park avenue at the present time than there was in 1892, in this vicinity.

From my own observation there has been an increase of vacancies as compared with those before the elevation of the tracks.

I have examined the premises in suit for the purpose of
67 appraising them. It is a five-story and cellar brick building, with stone trimmings. The grade floor is occupied by three stores. The upper floors are laid out in apartments, two on each floor; the northerly ones consist of five rooms and bath; the southerly one consists of six rooms, a store room and a bath room; making 8 rooms in all. Each apartment is equipped with what are known as all improvements. That does not include steam heat or hot water supply, but hot water is made by each individual tenant. The building is very well constructed; the wood work of the main portions being hard wood, and the rest cabinet trim. Altogether it is a building that is superior to the usual run of apartment houses of this description. The dimensions of the lot are 26 x 76.10. I think that is 94 per cent. of a full lot, according to the Murray-Hoffman rule. A full lot is 25 feet front by 100 feet in depth. That is the standard of real estate values and is so recognized by real estate men in this city.

In my opinion the value of the premises in suit in 1892 was $45,000, $15,000 for the lot and $30,000 for the building; in 1888 the lot was worth $12,250; in 1893 the premises were worth $43,750,

the lot $14,250 and the building $29,500; in 1894 the premises were worth $42,750, the lot $13,750 and the building $29,000; in 1895 they were worth $39,000; lot $12,000 and building $27,000; in 1896 they were worth $37,750, lot $11,750, building $26,000; in 1897, $33,000, $10,000 for the lot and $23,000 for the building; in 1898 they were worth $32,000, lot $9,575, building $22,425; in 1899 $31,000, lot $9,300, building $21,700; in 1900, $30,000, lot $9,000, building $21,000.

There is a ratio between fee and rental values recognized by real estate dealers for different classes of property. The ratio be-
68 tween the fee and rental values for this class of property is about 9 per cent. That ratio has prevailed since 1892 to the present time.

In my opinion the rental value of the property in suit for each year from 1892 to the present time is as follows: 1892, $4,000; 1893, $3,925; 1894, $3,835; 1895, $3,500; 1896, $3,400; 1897, $2,975; 1898, $2,875; 1899, $2,775; 1900, $2,700.

I am familiar with the course of fee and rental values on Lexington and Madison avenues since 1892.

Q. What has been the course of fee values on Lexington avenue since 1892 in this vicinity?

Objected to as immaterial, irrelevant and incompetent and as not furnishing a proper basis for comparison.

Objection overruled. Exception to defendants.

A. Upwards; 25 to 30 per cent. Almost the same applies to Madison avenue; 30 per cent. applying to Madison and 25 per cent. to Lexington avenue, about.

Q. What has been the course of rental values on those avenues during the same period?

Same objection, ruling and exception.

A. Upwards; 5 per cent. to 10 per cent.

Q. What in your opinion is the value of a full corner lot on Lexington avenue in this vicinity at the present time?

Same objection, ruling and exception.

A. This vicinity would be very changed. At 115th street, my opinion is, about $27,000. 116th street would be a great deal more money.

Q. Take Madison avenue, in a location corresponding to that of the plaintiff; what is the value of a full corner lot?

Same objection, ruling and exception.

A. About $28,000 to $29,000.

69 For similar apartments in the same neighborhood competition tends to reduce to a uniform value, everything else being equal. There are apartments similar to the plaintiff's in this vicinity off the line of the railroad. In some cases I know of the rental value of those apartments at the present time.

Q. How does the rental value of the plaintiff's apartments compare with the rental value of similar apartments off the line of the railroad, in this vicinity?

Objected to as immaterial, irrelevant and incompetent.
Objection overruled. Exception to defendants.

A. Similar apartments in this vicinity off the line of the railroad will bring about 25 per cent. rent more than the plaintiff's apartments do.

Q. Would that difference obtain since 1897?

Same objection, ruling and exception.

A. Yes, sir; by a decreased value of the same apartment, the rental value of the plaintiff's apartments to a great extent by decrease and by a slight increase.

The elevation of the defendants' railroad tracks on Park avenue did not add any new transportation facilities in this neighborhood. There is a station at 110th street at the south and at 125th street at the north, and they were there before the elevation of the tracks, and trains were stopped at those stations.

I think the plaintiff originally purchased 50 feet and 5 inches on the corner of Park avenue and 115th street, the northwest corner; 50 feet and 5 inches on Park avenue, and 93 feet on 115th street; and then two other lots 50 feet front by 100 feet and 10 inches deep on 115th street, forming an L on the westerly end of the corner lot.

Then he bought 26 feet 5 inches, I believe, on Park avenue,
70 running westerly 90 feet, being an inside lot on Park avenue.

I have calculated how many full lots there were in that tract fronting on 115th street.

Q. How many?

Objected to as immaterial, irrelevant and incompetent.
Objection overruled. Exception to defendants.

A. There were four and a half to five lots on 115th street and 94 per cent. of a corner lot on Park avenue.

The course of fee and rental values I have given for the premises in suit represents the average course of fee and rental values of property on Park avenue in this vicinity.

Cross-examination—In answer to defendants' counsel:

I mean that property on Park avenue has depreciated at the present time. I do not think it can depreciate very much longer, because it will get so low there will be other uses for the property and then it will remain at that figure.

I know nothing about the number of trains that stop at 110 and 125th Streets stations. I should judge that about 25 per cent. more trains stop at 125th street at the present time than before the elevation of the tracks. These are mostly through trains, though; the

increase is mostly in the through trains. Formerly it was mostly local trains that stopped there. Now, I think, with very few exceptions, most of the fast trains stop there. I do not believe there is a fast train stops at 110th street.

Q. Will you name a similar apartment in the vicinity of this property in suit that brings 25 per cent. more rent than this property?

71 A. Yes; two doors west of this corner, $27 for the same number of rooms that the plaintiff gets $20 for. I should say the number of that house is 75 or 77 East 115th street. I do not know the exact number. It is exactly the same kind of a house, built at the same time, of the same material, and the same owner.

Q. Name one that the same owner does not own that brings 25 per cent. more rent in this vicinity?

A. On the northeast corner of Lexington avenue and 115th street the apartments bring 25 per cent. more than these do; the north half brings 25 per cent. more rent than this one does at the present time; in other words, you can get $25 there for the same number of rooms that you can get $20 for in this one. That house was built about 1890, with about the same kind of improvements. Since that house was built the surface road has gone through there and it has access to it.

In my opinion the corner lot on 115th street and Madison avenue is worth at the present time $28,000. There are four lots on that corner. All of them face 25 feet on Madison avenue. That is my opinion, and it is based on sales previously made in this vicinity, and what the property would sell for in my estimation, if put upon the market, and sales made of late day in streets adjacent to this one two or three blocks away.

Q. Name a lot sold in this vicinity that would indicate that this property is worth $29,000?

A. The southwest corner of 118th street and Madison avenue. I am looking at a memorandum that I have made of various sales, and I could not testify to all the sales in our neighborhood without the memorandum. I want to look at it to refresh my memory.

The southwest corner of 118th street and Madison avenue,
72 33 by 100 feet, five-story brick, sold in May for $70,000. That building was built in 1897. I do not know whether cash was paid for that property, but that was the price; I think there was some trade in it. Then, on the corner of 116th street and Madison avenue in December, 1899, the building, 50 feet by 100 feet, sold for $144,000. That building has previously sold as low as $90,000. My first memorandum of that building is in 1892, when it sold for $101,000. That was a foreclosure sale. The next sale was in 1892, when it sold for $112,000. It was sold by the man who bought it, and it was a regular sale. Then it was afterwards sold in that same year, foreclosed, for $110,500. Then, in 1899, it was sold as high as $144,000.

116th street is a different street from 115th street. That is the principal business street in that vicinity. It is 100 feet wide and

115th street is 60 feet wide. 116th street is and always has been open; that is you could go across from one side of the avenue to the other there at any place, but you never could on 115th street until, probably, about three years ago.

I should judge the size of the property at the northeast corner of 125th street and Park avenue is 100 feet by 100 feet. It may be 90 by 100 feet. I have to depend upon maps and memorandum for these things.

In most all cases the lots on Park avenue are all less than full lots, on account of the widening of the street, unless they have been altered or changed. I do not know off hand what that property brought when it was sold last. I think it was sold last probably from one member of the family to the other. I have forgotten at the present moment when it was sold before the new building was put up there. I do not know that the price paid for that
73 lot was $200,000. I would not be surprised if it was in that neighborhood. Assuming that it was, that would not shake my belief that property on Park avenue has been depreciating. The value of the 125th Street front is what gave that lot its value. They only used the Park Avenue front as an entrance for teams. It is 100 feet on Park avenue, but they have to have some depth, otherwise the rooms would be no good. Since that lot was bought there has been a building put up there. It is a 12-story brick building with marble trimmings. There have been other buildings in Park avenue in the last three years, and I can remember all of them. Three houses on the west side between 116th and 117th street-; this building, and that is all between 110th and 125th streets. Prior to 1897 Park avenue was not all built up up to 125th street excepting two lots. There are more lots than that vacant on it now. There was one block completely vacant, but that is the rocky bluff. I think on the east side of Park avenue between 117th and 118th streets there is one, 100 feet, and I could pick out considerably more, I think.

Q. That is all there is, isn't it; north of 125th street Park avenue has improved a great deal.

A. There has been considerable building up there; yes, sir.

The size of this lot is 76 feet 10 inches x 26 feet; 26 feet on 115th street and 76 feet 10 inches on Park avenue. It is a corner lot. The Hoffman rule does not always apply to corner lots; still, as to the areas compared with the valuation, I think it is comparatively the best rule that we have. It does not always apply as well to corner lots as to inside lots; that is to say, you cannot accurately figure on the percentage of the size of a corner lot as well as
74 you can on the percentage of the size of an inside lot by the Murray Hoffman rule.

The kind of street that property is on has a bearing on its value—whether it is a business street or not. Property on 116th street would be more valuable than property on 114th street, because 116th street is an artery, but the dimensions of the property, the area of the property, would not have any particular effect. Assuming two

lots of the same size, one on the corner of 116th street and one on the corner of 114th street, the one on 116th street would be of greater value.

I said that in 1892 the value of this property was $45,000, allowing $15,000 for the lot. I based the valuation of that lot upon the sales made at that time, of which I have a complete record, and my knowledge of business, being in business at that time in that vicinity, and making sales and rentals and leases and mortgages—general information and knowledge that I have as a broker and appraiser in that vicinity.

Q. What special sales did you have in mind; can you name one?

A. I have not equipped myself with the data in regard to the sales that I consulted and referred to. There were a few in that vicinity that I based it upon. I remember a sale in 1892 of a vacant lot on the southwest corner of 114th street and Park avenue. I think that was more than a full lot. I could not remember that the price paid was $11,000 without referring to date. It was sold on the exchange. That was one of the pieces of property that I took into consideration in valuing this; I took all corners in that vicinity that had been sold since 1892. I know that there was a sale in 1891 of the southeast corner of 116th street and Park avenue of a lot 25 feet x 100 feet. If I remember right, I think the price paid
75 was $16,000. That was a full corner lot. There was some difference there between a lot on 116th street and a lot on the corner of 115th street. I took that lot into consideration in calculating my value for which this property could be sold. I took the sales of both lots, also a lot in 113th street, southwest corner. I do not remember the particulars, but I know there was a sale at that time that I took into consideration.

Q. You have the value of this building running from $30,000 in 1892 down to $21,000 in 1900. Does that represent the natural deterioration of the building?

A. It does not.

Q. What are the elements that enter into the depreciation you have testified to?

A. Depreciation of the rental value to a great extent; a salable value—that is, the fee value, and what I could sell it for, what I could rent it for, and the general adaptability of the house for the particular neighborhood. I have not seen a schedule of rents for these premises. I heard the owner testify that it cost to build, in 1891, $27,000. That does not change my belief of my estimate of the value in 1892—it confirms it. I do not think it was worth more in 1892 than it was when it was built, but there is a difference between the cost of building a house and the value of it, otherwise nobody would build. There is a reasonable profit for the use of the money, time and the ability of the builder. In 1897 I said the lot was worth $10,000. The cause of the depreciation between 1892 and 1897 of $5,000 was, in my opinion, the elevation of the railroad in front of these premises. I have testified that at the pres-

ent date that lot is worth $9,000, and I attribute the depreciation to the same cause. There has been a constant depreciation, but the rate per year has varied.

Q. Take 1898. You have a valuation of $9,725 of this lot. What did you base your valuation on in that year?

76 A. That a full corner lot was worth $10,200 at that time. The trains were operated then in front of the premises and I observed the fact that the premises were not as rentable as they were before; that the rents they did get for them were not as high; and that some other information which comes to me as a broker, which probably I would not be allowed to testify to, as to offers and so forth, I figured out that that was a very fair valuation of a full lot on that avenue; and then I took a percentage of that full lot.

Q. You based that simply on those elements; not on any sales or anything of that sort?

A. The sales were very few.

In 1892 I testified that the rents of that property were $4,000 per year.

Q. Will you take up the houses in detail and give us what the rents were then; take the corner store first?

A. The corner store in my opinion was worth $100 per month, and the other stores were worth $28 and $25; the second floor south, 7 rooms and bath, $30; north, $24; the next floor south, $28; north, $22; the next floor, $26; $20; the next floor, 24; and about $19. Then of course my rental valuation is not a schedule rental. I allow a reasonable amount of variation of rents, and that would amount to more than $4,000.

It was an established fact that you could not get across Park avenue at 115th street, and we were of the opinion that when we could get across it might improve the accessibility and the value of the property in that vicinity; but our experience has been otherwise. You can get across Park avenue now at any part of it, but naturally people only cross at the street, and 116th street is almost one-third of the way from where the entrance is, and the natural inclination of a person going to that property is to go to 116th street and

77 cross the avenue there. Before this viaduct was built there were really two streets, one on each side of the old structure.

I know the southwest corner of Madison avenue and 116th street, 25 x 75 feet, five-story brick and *and* stone building. To the best of my recollection the buildings were not finished in 1894, and were sold at foreclosure. I could not tell off-hand what the price was without consulting my records. I do not know what condition the building was in when it was sold but it was not completed.

Q. You did not take that into consideration in forming your value of Madison Avenue property?

A. I noted the sale and took advantage of the sale, but I was not acquainted exactly with how much of the building was finished; therefore I could not take it entirely into consideration, though I knew it was an unfinished building at that time.

The southeast corner of 115th street and Madison avenue was a

lot 25 x 75 feet, with a five-story brick and stone building on it—a completed building. I don't believe that such a sale occurred, because I am not familiar with it, and I think there are a great many people in New York who would have paid a great deal more for the property than that.

Q. Won't you take the rents of to-day, that you said amounted to $2,700, and tell us in detail what they are; taking the store first?

A. In my opinion the corner store is worth what he gets for it, $60. The other two stores are worth $16 each. The second floor north is worth $17; the second floor south, $20. The third floor north, $16.50; south, $19. The fourth floor north, $16; south, $18. The top floor, $15; south, $17, when rented.

78 It would surprise me to learn that the actual rents received from that property are over $3,000 a year to-day.

Q. In 1897 you testified that the value of the rents was $2,975. Won't you in detail give what they were; taking the store first?

A. In 1897 the rents were about 25 per cent. less than they were in 1892, from my figures; in other words if a flat brought $24 in 1892, it brought $18 in 1897.

In my business knowledge a flat that brought $24 in 1892 would not bring more than $18 in 1897.

Re-direct examination—In answer to plaintiff's counsel:

I have this house for sale.

Plaintiff rests.

By DEFENDANTS' COUNSEL: I will reserve my motion to dismiss, if your honor please, until the conclusion of the case.

JOSEPH H. FRANKLIN, a witness called for the defendants, being duly sworn, testified as follows:

Direct examination—In answer to defendants' counsel:

I live at 14 East 125th street. I am manager of the Grand Central Depot and the Harlem line. I have been such manager since 1892. Before that time I was employed by the New York Central or New York and Harlem Railroad Companies as depot master of the Grand Central depot. I have been such depot master since 1871, and have been familiar with the tracks of the defendant between the Grand Central depot and Mott Haven. Prior to 1872 the tracks at 115th street were laid on the surface. There were two tracks. Then the tracks were sunken and there were four

79 tracks. At 115th street the tracks were pretty near the surface. Trains began running on the structure erected under the act of 1872 in 1874 or 1875, I won't be positive which. It was not in 1878.

I am familiar with the new viaduct structure running through Park avenue. There are four tracks upon that structure, two north-bound

and two south-bound. The north-bound tracks are on the west side and the south-bound on the east side. The outside tracks are used mostly for local trains and the inside tracks for through trains. There is a difference in weight between local and through trains, through trains being the heavier, and they run faster. The structure is ballasted with stone ballast, which was put in during the year 1899. I think we average nearly 500 trains a day now over that structure, counting an engine as a train, in both directions. There has been an increase in trains in the last few years; the through trains have increased more than the locals have for the last year.

Cross-examination—In answer to plaintiff's counsel:

What I call a local train over the line is a train that stops at 110th street and at Harlem and at Mott Haven. Some of the through trains stop there. Sometimes we use those outside tracks for express trains, and that has been done more frequently this summer than heretofore.

There is an up-grade from 110th street to 116th street past this property. Trains do more puffing to go up that grade than if there was a level track there. I am not positive that trains began to run on the four tracks in 1874 or 1875. I will swear that they began to run on the four tracks before 1877. It was either in the fall
80 of 1874 or the spring of 1875. I am speaking from my recollection and the recollections of other people—from what I have heard. I know the act requiring the railroad company to depress its tracks was passed in the spring of 1872, and a commission was thereafter organized under that act which prepared plans and specifications for the work. That act required a great deal of excavation of rock at various points north of 42d street to the Harlem river. I mean to say that they were able to do that work within three years from the spring of 1872. They commenced on that track, to the best of my recollection, probably the last of August or the first of September, and I am pretty positive that we ran over those four tracks in 1874.

Q. How late at night are trains operated over this structure?

A. 12.35 is the last train we have out until 4.35 in the morning. Between these hours trains are sometimes operated over the line. Some of those trains are quite heavy, and some of them are nothing but a light engine. There are only a very few trains between half-past 12 and 5 in the morning. Sometimes the trains we run to the shop have 16 or 18 cars. The maximum number of coaches attached to an engine on a regular train is about 15. The length of the cars will average about 65 feet, and the height about 14 feet 10 inches. The locomotive is the same height and same length as a car. These trains pass on that structure at the rate of 15 or 18 miles an hour. Some of the express trains will go as high as 20 or 23 miles an hour. Very few of them go up to 25 miles an hour. If I testified in the Sander case, tried before Mr. Justice Freedman last June, that they

sometimes go up to 25 miles an hour, I think it was true. I have lengthened out the time two minutes, and we do not run trains as fast now as we did a year ago. Most of the engines use hard
81 coal. Some of them use soft at the present time; but not over the Harlem line. I presume in the combustion of anthracite coal sulphuretted hydrogen is generated and emitted. I have noticed an odor from the burning of the coal.

Defendant's counsel offered in evidence chapter 115 of the Laws of 1807, which was also offered by the plaintiff.

Received in evidence.

Defendant's counsel offered in evidence a copy of a part of a map entitled "A map of the city of New York, by the commissioners appointed by the act of the legislature, passed April 3, 1807," and filed in 1811.

The map is marked Defendant's Exhibit 1. (Printed in appendix.)

Defendant's counsel offered in evidence chapter 263 of the Laws of 1831—Charter of the New York and Harlem Railroad Company.

Received in evidence.

Defendant's counsel offered in evidence copy of a map entitled "Profile and map of the Fourth avenue as surveyed for the contemplated Harlem railroad, New York, August, 1831."

Received in evidence and marked Defendant's Exhibit 2. (Printed in appendix.)

Defendant's counsel offered in evidence chapter 274 of the Laws of 1837; also chapter 702 of the Laws of 1872; also chapter 907 of the Acts of Congress of 1890, being the paragraph on page 37 of the acts of that year; also chapter 339 of the Laws of 1892; also chapter 548 of the Laws of 1894; also chapter 594 of the Laws of 1896; also chapter 613 of the Laws of 1898, which were received in evidence.

The foregoing statutes are not printed in this case on ap-
82 peal, but may be referred to and used by either party on any appeal herein with the same force and effect as if so printed.

Defendant's counsel offered in evidence a copy of a map entitled "Map of property required for the opening of Fourth avenue from 38th street to 135th street, New York, 1850;" being the map filed in pursuance of the proceedings called the damage map.

Received and marked Defendant's Exhibit 3. (Printed in appendix.)

Defendant's counsel offered in evidence a copy of a part of a map entitled "Plan and profile of work to be done in conformity with section 6 of the act to improve and regulate Fourth avenue, passed May 14th, 1872."

Received and marked Defendant's Exhibit 4. (Printed in appendix.)

Defendant's counsel offered in evidence articles of agreement, dated January 9th, 1832, between the mayor, aldermen and commonalty of the city of New York, and the New York and Harlem

Railroad Company, and embodying certain ordinances of the city of New York, dated December 16, 1831.

Received in evidence and the same is printed in the appendix to this case on appeal.

Defendant's counsel offered in evidence the original deed from Peter Poillon to the New York & Harlem Railroad Company, dated January 18, 1832, recorded in the office of the register of the city and county of New York, in Liber 338 of Conveyances, at page 515, on August 18, 1835:

PLAINTIFF'S COUNSEL: We desire to take a formal objection to this, as immaterial, irrelevant and incompetent, and on the further ground that it appears in evidence that the alleged grantor
83 in this deed had previously conveyed all his right, title and interest in and to the premises in suit, and also to the fee of Fourth avenue.

Objection overruled. Exception to plaintiff.

Received in evidence.

The same is in the words and figures following, to wit:

"This indenture, made this eighteenth day of January in the year of our Lord one thousand eight hundred and thirty-two between Peter Poillon of the twelfth ward of the city of New York, party of the first part, and the New York and Harlem Railroad Company, parties of the second part,

Witnesseth, that the said party of the first part, for and in consideration of one dollar, lawful money of the United States of America, to him in hand paid at or before the ensealing and delivery of these presents by the said parties of the second part, a receipt whereof is hereby acknowledged, and they, the said parties of the second part, and their successors from every part and parcel thereof, forever discharged by these presents, doth give, grant, bargain, sell and demise, unto the said parties of the second part, and their successors all that certain piece of land, situate, lying, and being in the twelfth ward of the city of New York, being part of one of the avenues laid out on the map of the city of New York, as the 4th avenue, and is included within a space of 24 feet wide running through the centre of said avenue, and between 115th street and 121st street, and is bounded and described as follows, viz.:

Northerly by land belonging to the estate of Samson Benson, dec'd; southerly by the old road leading from Harlem to
84 Harlem lane & McGown's pass; east and west by lines drawn parallel to the centre line of the 4 avenue on each side thereof at the distance of twelve feet therefrom.

To have and to hold the said premises and messuage above mentioned, with the appurtenances, unto the said parties of the second part, and their successors, from the day of the date hereof, for and during the full period of time, during which the said parties of the second part may remain an incorporated company, and on which they are to construct their railroad, and for no other purpose, with the power of sloping their embankments or excavations so much

farther beyond the lines of said premises hereinbefore granted, as may be necessary to support their work—not, however, extending beyond the width of the avenue.

In witness whereof, the said party of the first part hath hereunto set his hand and seal the day and year first above written.

P. POILLON. [L. S.]

Signed, sealed and delivered in the presence of

ISAAC ADRIANCE.

CITY AND COUNTY OF NEW YORK, *ss:*

I certify that on this sixth day of February, 1832, personally appeared before me Peter Poillon, who is personally known to me to be the same person described in and who executed the within deed and acknowledged to me that he executed the same for the uses and purposes therein mentioned.

I allow it to be recorded.

ISAAC ADRIANCE,
Com'r of Deeds in the City of New York."

85 Defendants' counsel offered in evidence deed dated January 18, 1832, from Benjamin L. Benson, of the twelfth ward of the city of New York, party of the first part, to the New York and Harlem Railroad Company, party of the second part, and recorded in the office of the register of the city and county of New York, in Liber 338 of Conveyances, page 518, August 18, 1835.

Same objection, ruling and exception.

Received in evidence.

Same is in the words and figures following, to wit:

"This indenture, made this eighteenth day of January, in the year of our Lord one thousand eight hundred and thirty-two, between Benjamin L. Benson, of the twelfth ward of the city of New York, party of the first part, and the New York and Harlem Railroad Company, parties of the second part;

Witnesseth, that the said party of the first part, for and in consideration of one dollar, lawful money of the United States of America, to him in hand paid at or before the ensealing and delivery of these presents by the said parties of the second part, the receipt whereof is hereby acknowledged, and they, the said parties of the second part, and their successors from every part and parcel thereof, forever discharged by these presents, doth give, grant, bargain, sell and demise, unto the said parties of the second part, and their successors, all that certain piece of land situate, lying and being in the twelfth ward of the city of New York, being part of one of the avenues laid out on the map of the city of New York, as the 4th avenue, and is included within a space of 24 feet wide,
86 running through the centre of said avenue, and between 106th street and 116th street, and is bounded and described as follows, viz:

Northerly by the old road leading from Harlem to Harlem lane and McGown's pass; southerly by land of Mrs. Margaret McGown, and east and west by lines drawn parallel to the centre line of the 4th avenue at the distance of twelve feet on each side thereof.

To have and to hold the said premises and messuage above mentioned, with the appurtenances unto the said parties of the second part, and their successors, from the day of the date hereof, for and during the full period of time, during which the said parties of the second part may remain an incorporated company, and on which they are to construct their railroad, and for no other purpose, with the power of sloping their embankments or excavations so much farther beyond the lines of said premises hereinbefore granted, as may be necessary to support their work, not, however, extending beyond the width of the avenue.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

BENJ. L. BENSON. [L. S.]

Signed, sealed and delivered in the presence of

I. ADRIANCE.

CITY AND COUNTY OF NEW YORK, *ss.:*

On this first day of February, A. D. 1832, before me personally appeared Benjamin L. Benson, who is personally known to me, and he acknowledged to me that he executed the same as his act
87 and deed for the uses and purposes therein mentioned. I allow it to be recorded.

I. ADRIANCE,
Com'r of Deeds in the City of New York."

Defendants' counsel offered in evidence two photographs showing the structure of the railroad company and the property in question.

Received and marked Defendants' Exhibits 5 and 6, respectively.

Defendants' counsel offered in evidence lease from the New York and Harlem Railroad Company to the New York Central and Hudson River Railroad Company of its steam line of railroad north of the Grand Central depot, dated April 1st, 1873, for the term of four hundred and one years.

Received in evidence.

LORENZO S. PALMER, a witness called for the defendants, being duly sworn, testified as follows:

Direct examination—In answer to defendants' counsel:

I reside at 305 West 132d street. I am a real estate broker and appraiser. My office is in the Twelfth Ward Bank building, 125th street and Lexington avenue. I have been in the real estate business between 15 and 16 years. During that time I have bought,

sold and appraised and rented property. My operations have been principally in Harlem, east side. I examined the property, 1626 Park avenue, day before yesterday. It is a five-story brick and stone building. I understand it is 77 feet 10 inches on the avenue—that is what the map shows—and 26 feet on the street. It is about $\frac{4}{5}$ths of a full lot. I have made a calculation of the value of that property in 1892, which is $29,250; $8,250 for the lot and $21,000
88 for the building. In 1893 I value the property at $29,000; $8,250 for the lot and $20,750 for the building. In 1894, $28,750; $8,250 for the lot and $20,500 for the building. In 1895, $28,500; $8,250 for the lot and $20,250 for the building. In 1896, $28,250; lot $8,250, building $20,000. In 1897, $30,000; lot $10,500, building $19,500. In 1898, $29,500; lot $10,500, building $19,000. In 1899, $29,500; lot $11,00-, building $18,500. At the present day, $29,750; lot $11,250, building $18,500.

I have made an estimate of the rental value of this property from 1892 to date. In 1892 the rental value was $2,976, divided as follows: The corner store, $50 per month; the two adjoining stores on the avenue, $15 each; the first flat above the store, south, $23; north, $22; the second flat above the store, south, $22; north, $21; the third flat above the store, south, $21; north, $20; the fourth flat, south, $20; north, $19, making $2,976.

In 1893, 1894 and 1895 the rental value was about the same. In 1896 there was a slight depreciation. I figure it in that year $2,880. I figure an increase from 1897 up.

Q. Will you give us the figures?

A. The corner store, $60; the two inside stores on the avenue, $18 each. The first flat, south, $21; north, $20. The second flat, south, $20, north, $19. The third flat, south, $19; north, $18. The fourth flat, south. $18; north, $17, making a total of $2,976.

In 1898 and up to the present time the rental value was about the same.

I was familiar with the old structure before the present viaduct was put up in Park avenue in front of these premises. There was not access from one side of the avenue to the other. At the present day 115th street is a thoroughfare and there is free access across any portion of the avenue that never existed before. 115th street is 60 feet wide.

89 I am familiar with Lexington and Madison avenues and with the character of buildings on each of those avenues. There is a difference between the buildings on Madison and Park avenues between 110th and 125th street, and on Lexington and Park avenues.

Q. What is the difference?

A. The character of the buildings on both Lexington and Madison avenues are of a far superior quality to those on Park avenue. Most of them are steam heated flats, and in Madison avenue, from 120th to 125th street it is entirely private houses. That portion above 116th street and 120th street has been built up in the last two or three years—it was most all vacant ground—with a superior class

of houses. Most all of the houses on Park avenue are of a common tenement order.

I am familiar with the Verona flats, at 116th street and Lexington avenue, about which Mr. Whittle testified. I collected the rents there for 1887, 1888 and 1899 and 1900. The rents there as compared with the rents on Park avenue have depreciated. The exact number of vacancies on Park avenue, between 110th and 125th streets, is 80 apartments and 35 stores. I know that from personal investigation. There are far more stores on Park avenue than on Madison avenue in the same locality. The same thing appertains to Lexington avenue.

Cross-examination—In answer to plaintiff's counsel:

There are three vacant flats and two stores in the building on the southwest corner of Park avenue and 116th street. This count was made two weeks ago last Saturday.

I am not a salaried employee of the New York Central
90 and Hudson River Railroad Company. I am paid for each case in which I testify. I determine that the plaintiff's lot is four-fifths of a full lot in value by figuring out the area of the square feet. In a lot 25 x 100, and the area of this lot 70.6 something by 26 figures about four-fifths of a full lot. I use the Murray-Hoffman rule in my calculations on inside lots, not on corners. I base my calculation entirely upon the superficial area.

I went into business for myself in October, 1889. I have never, in my experience, built a house.

I collected the rents for the Verona for J. P. and E. J. Murray. I was an employee of that office at that time. I am and always have been in the renting business. My cards and note-heads show that. I always solicit renting if I can get it.

Q. You were examined in supplementary proceedings, were you not, a short time ago?

A. I was.

Q. Did you testify before Judge Haskell in the city court on May 17, 1900, as follows: "I do not collect rents or take charge of any property—simply buying and selling?"

A. I did, because I had nothing to collect from. I solicit renting, though.

Q. But at that time you did not collect rents or take charge of properties?

A. At that time I had no rents to collect, and no houses to collect rents from; at the same time I solicit the collection of rents.

Since the defendants' structure was elevated and trains began to run on it I have not rented any houses from 110th to 120th street, within two hundred feet of the structure. I had quite a few transactions for the six months prior to February of this year.

Q. Haven't you been adjudicated a bankrupt lately?

A. I have.

91 Q. And didn't you testify before the referee in bankruptcy that for six months previous to February, 1900, you had not earned anything?

A. I don't know as I did; no.

Q. I have here your examination in bankruptcy; let me hand it to you for the purpose of refreshing your recollection. (Handing paper to witness.)

A. (To the court:) Your honor, am I compelled to go into this testimony about private matters?

THE COURT: To a certain extent, yes, where it has a bearing upon your qualification as an expert. Of course, merely for the purpose of prying into your private affairs it will not be permitted; but in so far as it has a bearing upon your experience during the past six months, or during a period prior, it will be perfectly admissible.

Q. Have you refreshed your recollection from your testimony?

A. I have not read it yet. I will look it over.

Q. Look at the third question from the bottom, there?

A. (Reading:)

"Q. Have you earned any money in the last six months?

A. Yes, sir.

"Q. How much?

A. About $1,800 or $2,000.

"Q. When was that?

A. About February.

"Q. Have you earned any since?

A. About $300 or $400.

"Q. Do you know what became of that $1,800 or $2,000?"

Q. Now, the next question over the page.

A. (Reading:) "Four months past, five months, I didn't make anything for six months previous to that." Is that what you want to get at?

Q. That was true?

A. It might have been.

Q. Wasn't that testimony true?

A. It might have been; I would not deny that it was not.

Q. Have you had any sale on Park avenue from 110th street to 120th street since the elevation of the structure and the operation of trains thereon?

A. No, sir; I have not.

92 Q. Do you remember the sale of the property No. 1642 Park avenue, one door next to the northwest corner of 116th street and Park avenue?

A. What sale?

Q. Do you remember that that was sold after trains began to be operated on the structure for $19,000?

A. No, sir; I do not.

I testified that I heard of the sale of that property on the exchange, but I think it was previous to 1897; I would not be positive as to the date; I heard of a foreclosue sale at $19,000. My best recollection is that it was previous to 1897. I may be mistaken in

the date. I think it was in 1896. The structure was up in 1896, but trains were not in operation on it. To the best of my recollection, Mrs. Tilly Berger, in 1890, paid $26,000 for that property. I sold it in 1893 for $23,500, and in 1896 it sold for $19,000 at foreclosure.

I don't think I testified in the Larney case, before Mr. Justice Fitzgerald, that I did not base my valuations upon sales. It has some bearing upon my mind. I do not think a foreclosure sale is anything to go by. It might be some evidence of the value of property at the time of the sale. It don't always follow that you get the exact value for your property.

I understand that by rental value is meant the value a house is capable of producing when full, and by fee value what the house would sell for in the open market, but not at auction.

Q. The fee value is what it will sell for at private sale?

A. Well, mostly so, although there are times when a house will bring what I would consider it worth on the exchange; but eight times out of ten it won't, because the exchange is inhabited by speculators, who buy property with an idea of turning it over at
93 a profit on private sale, and, therefore, you do not realize the same amount of money that you would at a private sale.

I think that anything that would intercept the light coming into property would injure its fee and rental value to some extent, and anything that disturbs the quiet and repose of tenants interferes with the rental value; I also think that anything that invaded the privacy of an apartment would interfere with the rental value. Whether those elements would affect the rental value seriously and injuriously all depends upon the conditions that exist when the house was built. In this case the house was built upon an avenue which was always a railroad avenue, and those conditions existed at the time it was built, and the house would not feel the same effect as if a railroad was brought there after the house was built. To certain portions of the building I think as much light was taken away from the premises by the old structure as by the present structure—the first and second floors; the old structure, a blank wall, took away considerable light from there. Now, the third and fourth floors, the elevated structure, takes away some light, but there is a great deal of diffused light which lights up both the first and second stories, which were heretofore dark.

I think privacy has an effect on the rental value; also freedom from odors, cinders and dust; anything that would interfere with the stability of a building would affect its rental value to a certain extent.

Q. Have you used in the transaction of your private business the same degree of judgment that you have in forming your opinion as to the values of this property?

A. I don't know what you are trying to get at, I assure you.

Q. Can you answer the question?

A. I cannot answer that question; no, sir.

94 GEORGE F. BOULARD, a witness called for the defendants, being duly sworn, testified as follows:

Direct examination—In answer to defendants' counsel:

I live at 521 East 142d street. I am by profession a civil engineer, and during the progress of the Park Avenue improvement, so called, I was in the employ of the Park Avenue board as chief assistant engineer, and as such I had charge of the building of the viaduct structure at that time. I am familiar with the plans and maps of the structure and with the progress of the work that came under my direct supervision.

The map now shown me indorsed "Amended plan for the improvement of Park avenue north of 106th street in the city of New York, exhibiting by map, profile and cross-section the work of alteration and changes to be made in the structure and so on, between 111th and 115th streets, prepared for filing in the office of the comptroller in conformity with chapter 339 of the Laws of the State of New York, approved April 19th, 1892, and of the same law as amended by chapter 548 of the Laws of 1894, approved May 8th, 1894," was made under my direction. That is a copy of the original map. What I mean by that is, that this shows a section of the map which was made under my direction. It shows a section of the structure in front of the premises in suit at 115th street and Park avenue.

Defendant's counsel offered the said map in evidence.
Received and marked Defendants' Exhibit 7.
The above map is reproduced in the appendix to this case on appeal.

95 The map now shown me was also made under my direction, and shows that portion of Park avenue between 114th and 116th streets, practically—although it don't go to 116th street. It also shows a portion of the property on the northwest corner of Park avenue and 115th street, and it shows how our structure is with reference to the same. It is shown in the regular cross sections here; the dotted lines show the old and the very black lines show the new structure.

Defendant's counsel offered in evidence the last map identified by the witness.

In answer to plaintiff's counsel:

I did not make this map personally. It was made under my dictation. I have personally verified the measurements given on this map, and can swear that those measurements as given on the map are correct.

Map received in evidence and marked Defendants' Exhibit 8.
The above map is reproduced in the appendix to this case on appeal.

In answer to defendants' counsel:

Q. Now, will you take that map and say what the width of the old structure was at the south line of these premises at the northwest corner of 115th street and Park avenue—at the surface of the avenue?

A. At 115th street, at the surface of the avenue, the old structure was practically 56 feet and 4 inches. On the old structure the tracks almost came to the grade of the surface of the street at that time. It was shown and delineated just as shown on this map.

North of there the grade of the street changes and rises towards the north. At the north end of these premises the width of the old structure at the surface was 54 feet, the depth was 5½ feet. The width at the bottom was 50 feet in the clear, that is, between
96 walls. Now we are talking about the cut at the north line of the property. There was a slope in the foundation walls there; they backed into the avenue. At the base of the rail the wall set back 5 feet, making a total of 58 feet practically. There were four tracks in the old cut and the avenue there was 140 feet wide. The sidewalk on the west side in front of these premises is 15 feet wide. The height of the parapet wall of the old structure under the act of 1872 at the south end of these premises was practically 3 feet.

Q. Taking the new structure, how many rows of columns are there in front of these premises?

A. There are two bents. That makes six columns. There is one bent practically 2½ feet north of the building line of 115th street. The next one is 65 feet and 5 inches north of it. The side columns are 20 inches square, and the centre one is 24 inches square. From outside to outside of columns at the southernmost bent it is 53 feet and 8 inches, and at the northernmost bent 57 feet. The height of the rail base of the present structure above the present grade of the street at the south line of the premises is 34 feet and one-half inch, and on the north line 26 feet 11½ inches. The total width of the structure at the southernmost line of the premises is 56 feet 2 inches; that is the extreme outside width on the very dots. The extreme outside width at the northern part of these premises is 57 feet 8 inches. The total height of the structure at the southernmost part of these premises is 34 feet; at the northernmost part 31 feet. That is from the present grade of the street.

I was employed by the New York Central and Hudson River Railroad Company during the progress of the work under the act of 1872, but I was not employed upon the work. If my recollection serves me, trains began to run on the structure erected under the act of 1872 in 1874.

97 Cross-examination—In answer to plaintiff's counsel:

I have no record of the date when trains first began to be operated on the structure erected under the act of 1872. It is all from memory—in reference to 1872. I do not mean in reference to put-

ting down on the map. I have the data for that. I do not know when the commission required by the act of 1872 was organized, nor that it did not get to work until the spring of 1873. I think the construction was going on in 1873. In 1874 I know we were riding on the road to a certain extent, and the Fourth avenue was cut up and dug up and we were going down through it. It is possible that in 1874 the trains were operated on the easterly side of the avenue at this point.

Q. That is entirely outside of the lines of the present structure and of the structure of 1872?

A. I say that is possible. I do not deny that.

I am not an employee of the railroad company now. Of course I expect to be paid for my testimony. I have an understanding as to that.

The measurements made on the diagram from out to out of columns are at the surface of the avenue. The distance from the outside of the wheel guards to the house-line on the north line is 40 feet and 6 inches. From the outside of the westerly wheel-guard to the outside of the easterly wheel-guard, on the southerly line of columns, the distance is 59 feet.

Q. Does not the structure differ at the northerly line of columns from the structure at the southerly line of columns in front of these premises?

A. It changes right at the line. To a certain extent the structure south of the northerly line of columns—the road-bed—overhangs the columns.

Q. How much does the structure overhang the outside of the column in front of these premises?

98 A. One foot. I have not given the height of the hand-rail from the surface of the avenue. That is on top of the structure, and it is attached to the structure.

Q. What is the distance from the surface of the avenue to the top of this hand rail at the southerly line of columns in front of the premises?

A. That I cannot give you, but I can give you the total height up to the hand-rail up at 115th street; that is, up to the base of the rail. I think I have given you that already. When I gave the total height of the structure at the southerly line of columns in front of these premises, I meant from the present surface to the base of the rail. That is the top of the structure. The height of the rail there is six inches. I cannot say positively what the height of the hand-rail is. I think it is 3 feet, though. It is only as a guide; that is all; and it does not exceed 3 feet.

Redirect examination—In answer to defendants' counsel:

Q. How high from the pavement are these wheel-guards on the bottom of the columns?

A. They differ very materially as the street stands to-day. At the westernmost column on the southern bent in front of these

premises the wheel-guard is about 9 inches high above the pavement.

It only shows on the map as it should be according to grade, but not as you find it. The street is not graded in accordance with the grades that were established for it. The grade of the street is not put up to the lines which the structure is built for. This change in the structure which the plaintiff's counsel asked me about was ordered by the board for the Park Avenue improvement, which board did this work. The contractors made the change. The con-
99 tract for the superstructure was between the board for the Park Avenue improvement and the Elmira Bridge Company. The contract for the sub-structure was made between the board and John J. Hopper, and covered some of that ground there, I believe.

Re-cross-examination—In answer to plaintiff's counsel:

I think I remember when the tracks were laid on this present structure. It was about March, 1896, when we commenced to lay our first track on the structure.

Q. Those tracks were laid by the New York Central and Hudson River Railroad Company, were they not?

A. I suppose they were. It was by direction of the board for the Park Avenue improvement that the tracks were laid. I do not recall the fact the board wrote a letter requiring the work to stop, and the railroad company refused to stop the work of laying the tracks. There is no question but what is was necessary when they commenced to lay tracks to run construction trains over the structure to carry the rails there. Those trains were run by the New York Central and Hudson River Railroad Company and paid in the estimate for the Park Avenue improvement. I suppose every train that went on there was owned by the New York Central and Hudson River Railroad Company. I have no doubt about that at all.

Rebuttal:

JOHN H. WHITTLE, recalled by plaintiff in rebuttal, testified as follows:

I have had the premises on the southwest corner of Park avenue and 116th street in my hands since October, 1898. I had charge of those premises two weeks ago. I have heard the testimony
100 given by Mr. Palmer as to the number of vacancies in those premises two weeks ago. At that time there were two stores vacant and 17 apartments.

Cross-examination—In answer to defendant's counsel:

There are 37 apartments in the building. That is not Mr. Sanders' property. It is the United States Life Insurance Company's property, of which I am agent. There are 19 apartments in that portion of the building abutting on Park avenue itself. Two

weeks ago there was one vacancy on the first floor; on the second floor there were two; on the third floor two. That is five. On the fourth floor two. That is eight. On the top floor one. That is nine altogether, out of twenty-one, and that is all on Park avenue. There are four stores on Park avenue; two occupied and two vacant. On the Park Avenue side there are four apartments on each of the upper four stories and three on the first floor.

Plaintiff's counsel offered in evidence, from the register's office, deed from Benjamin L. Benson to Robert Henderson, dated October 15, 1825; recorded March 9, 1826, in Liber 200 of Conveyances, page 382.

This deed conveys "All those certain lots, pieces or parcels of land situate lying and being in the 12th (late 9th) ward of the city of New York and known and distinguished on a certain map of the lands of the said party of the first part made by J. F. Bridges, city surveyor, and bearing date September, 1825, and which map is now on file in the office of the register of the city and county of New York, as lots numbered 938, 939 and 940, together with all and
101 singular the rights, members, privileges, hereditaments and appurtenances whatsoever under the said above mentioned and described premises in any wise appertaining or belonging."

Objected to by defendants' counsel as immaterial, irrelevant and incompetent, upon the ground that the property conveyed by that deed is on the opposite side of Fourth avenue; and, further, upon the ground that it is not in rebuttal.

The COURT: I will receive the deed. If there be no materiality to it, it certainly cannot affect the defendants' rights in any way.

Exception to defendant.

Received in evidence.

Plaintiff's counsel offered in evidence, from the register's office, map number 115, entitled, "Map of the Third Avenue tract, formerly the property of B. P. Benson and Dr. Van Arsdale," and marked, "Surveyed September, 1825, by J. F. Bridges, New York."

This is the map referred to in the deed just put in.

Same objection, ruling and exception.

Received in evidence.

Following is a brief description of said map:

"On this map Fourth avenue and the intersecting streets are represented as laid out in accordance with the map of the city of New York as the latter was established under the Laws of 1807, chapter 115. Fourth avenue is shown of the width of 100 feet. The map represents lots laid off and numbered. Lot number 938 is represented as at the northeast corner of Fourth avenue and 115th street, and lot number 939 is just north of number 938. Lot number 940 is just north of number 939. Each of the lots named has a
102 frontage of 25 feet 2½ inches on Fourth avenue, and a depth of 100 feet. The 'Old road to Harlem' is represented as running in a northeasterly direction diagonally across Fourth avenue in front of the premises in suit."

Plaintiff's counsel offered in evidence the following allegation from the answer of the defendants:

"That on or about the 28th day of April, 1892, the plaintiff herein commenced an action as plaintiff in the supreme court, New York county, by Joseph Ullman, his attorney, against these defendants for an injunction and damages by reason of the defendants' railroad structure and the operation of trains thereon in Park avenue opposite that portion of the premises situated on the northwest corner of Park avenue and 115th street, having a frontage of 77 feet on Park avenue and 26 feet on 115th street; that the said action is at issue and pending and undetermined, and that the relief sought in said action, and the alleged facts upon which such claim for relief is founded, are in part identical with the plaintiff's claim for relief and with the alleged facts upon which such is founded in this action."

It is stipulated that the action just described was discontinued by an order entered February 27, 1900.

Plaintiff's counsel offered in evidence resolution passed by the board of aldermen January 20, 1832, concurred in by the board of assistant aldermen January 30, 1832, approved by the mayor February 1, 1832, in language following: "That the New York and Harlem Railroad Company be and are hereby authorized to take possession of the ground owned by the common council over
103 which the line of said railroad is ordered to be constructed, and that they be permitted to use the same during the continuance of the present charter for the purposes of a railroad, and that only, and when they cease so to use it, it shall revert to the corporation, provided always that the said land shall be so used as not to interfere with the use of the cross streets, and on condition, however, that if the said corporation shall not commence the said railroad and complete the same within the time limited by their charter, then the privilege hereby granted shall cease and be void."

Objected to by defendants' counsel as incompetent, immaterial and irrelevant, and as not rebuttal.

Objection overruled. Exception to defendants.

Testimony closed.

DEFENDANTS' COUNSEL: I move to dismiss the complaint as to each of the defendants on the following grounds:

I. That the plaintiff has failed to show that he had any property rights which were or have been taken by the defendants or either of them.

II. That the only loss or inconvenience, if any, shown is that resulting from the tearing up of Park avenue by the reconstruction of defendants' railroad, pursuant to legislative authority and direction, and from the additional noise incident to the operation of trains in the depressed structure erected under chapter 702 of the Laws of 1872, under the new viaduct structure and upon said viaduct structure erected under chapter 339 of the Laws of 1892 and its amendments.

III. That all of the acts complained of have been done, not
104 by these defendants or either of them, but by the board for the Park Avenue improvement above 106th street, established by chapter 339 of the Laws of 1892, their contractors and agents.

IV. That the plaintiff is barred by his own laches and acquiescence, and the laches and acquiescence of his predecessors in title, from maintaining this action.

V. That the defendants have obtained under the deed from Peter Poillon to the New York and Harlem Railroad Company, produced in evidence, and by prescription, the right to maintain and operate any lawful railroad structure, either upon, below or above the surface of Park avenue within the lines of the depressed cut structure under the act of 1872, without liability to the plaintiff for damages, it appearing that the viaduct railroad structure opposite the premises described in the complaint has been erected wholly within the space occupied by the defendants for railroad purposes for more than twenty years prior to the commencement of this action.

VI. That no material additional interference with the use and enjoyment of plaintiff's premises has been shown by reason of the elevation of the defendants' railroad from the permanent viaduct structure erected under chapter 702 of the Laws of 1872 to the structure erected under chapter 339 of the Laws of 1892.

VII. That the plaintiff has failed to show any loss of rents from his premises due to the permanent structure erected under chapter 702 of the Laws of 1872.

VIII. That the plaintiff has failed to show any loss in the rental value of his premises due to the permanent structure erected or in course of erection, under chapter 339 of the Laws of 1892.

105 IX. That plaintiff has failed to show that the defendants, or either of them, have been guilty of any negligence either in maintaining the depressed cut railroad structure erected under chapter 702 of the Laws of 1872, or in the operation of trains on said structure, or in the erection of the viaduct structure, or the operation of trains upon the viaduct structure erected under chapter 339 of the Laws of 1892.

X. That the plaintiff has an adequate remedy at law.

XI. That the plaintiff has failed to make out a case for any equitable relief.

XII. That it now appears that the portions of Park avenue which are, and for more than twenty years prior to the commencement of this action have been, used for the purposes of a public street, have not been used in any way in excess of or inconsistent with the use to which a street opened by the mayor, aldermen and commonalty of the city of New York, under the statute in such cases made and provided may be lawfully put.

XIII. That upon the completion of the railroad structure in 1874 or 1875, erected under chapter 702 of the Laws of 1872, the municipal authorities abandoned to the defendants for the sole and exclusive use of their railroad a strip of land along the centre of Park avenue about 59 feet in width, some portions of which had thereto-

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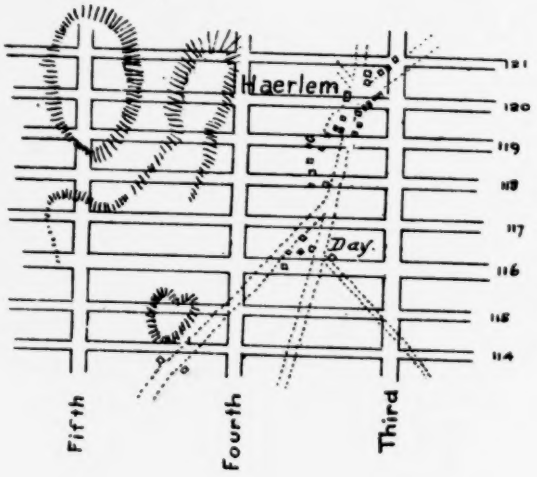
p. 109



SUPREME COURT
SPECIAL TERM PART 6
C. A. MORRISON
STENOGRAPHER

fore been devoted to the use of a public street subject to the rights of the defendant railroad companies.

XIV. That the plaintiff and his predecessors in title for more than twenty years prior to the commencement of this action acquiesced in such abandonment, and that the defendant railroad com-
106 panies have, by a continuous and exclusive use of said strip of land for railway purposes, acquired the right as against the plaintiff to maintain and operate the railroad structure erected under chapter 702 of the Laws of 1872.

XV. That the plaintiff and his predecessors in title for more than twenty years prior to the commencement of this action acquiesced in such abandonment, and that the defendant railroad companies have, by a continuous and exclusive use of said strip of land for railroad purposes acquired the right as against the plaintiff to maintain and operate any railroad structure authorized and required by law, and on said strip of land, whether below or above the established grade of Park avenue.

XVI. That it now appears under the evidence and the stipulation made by the respective parties in relation thereto that Park avenue was opened in 1853 by the mayor, aldermen and commonalty of the city of New York, subject to all the rights of the defendant The New York and Harlem Railroad Company, its successors and assigns, to maintain and operate a railroad in said avenue as then, or at any time thereafter, authorized and required by law.

Motion denied. Exception to each defendant.

The papers, maps, &c., not printed or reproduced in this case on appeal may be produced and used on any appeal herein by either party with the same force and effect as if the same were printed or reproduced in the record.

The foregoing case on appeal contains all the evidence taken and proceedings had on the trial of this action.

107 & 108 DEFENDANTS' EXHIBIT 1.

Copy of a part of a map entitled "A map of the city of New York, by the commissioners appointed by an act of the legislature passed April 3, 1807," upon which is inscribed the following:

"The commissioners appointed by an act entitled "An act relative to improvements touching the laying out of streets and roads in the city of New York and for other purposes" passed April 3, 1807, certify this map to be made in conformity with the provisions o' said act, and in witness thereof have hereunto subscribed their names and affixed their seals the twenty-second day of March in the year of our Lord one thousand eight hundred and eleven.

GOUVR. MORRIS.
SIMEON DE WITT.
JOHN RUTHERFORD."

(Here follows diagram marked p. 109.)

110 DEFENDANTS' EXHIBIT 2.

Copy of a part of a map entitled "Profile and map of the Fourth avenue as surveyed for the contemplated Harlem Railroad, New York, August, 1831, on which is inscribed the following:

"At a meeting of the board of directors of the New York and Harlem Rail Road Company in the city of New York on Tuesday the 13th September, 1831, it was resolved that the line of the route of their rail road be through the center of the Fourth avenue from the north side of 23rd street to Harlem river and also that the line of the route of the branch of the same be through the center of 125th St. from the center of the 4th avenue to the Harlem river and that the maps of the same as made by Edwin Smith, city surveyor, be presented by the common council of the city of New York, for the approval previous to the filing of the same in the pursuance of the requirements of the act of incorporation.

Witness *of* hands and seals.

CAMPBELL P. WHITE.
ISAAC ADRIANCE.
I. L. JESSUP.
A. HOSACK.
HENRY HONE.
JOHN LOZIER.
JOHN MASON.
SAM'L F HALSUP."

(Here follows diagram marked p. 111.)

No. 387.
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p 111

SUPREME COURT
SPECIAL TERM PART 2
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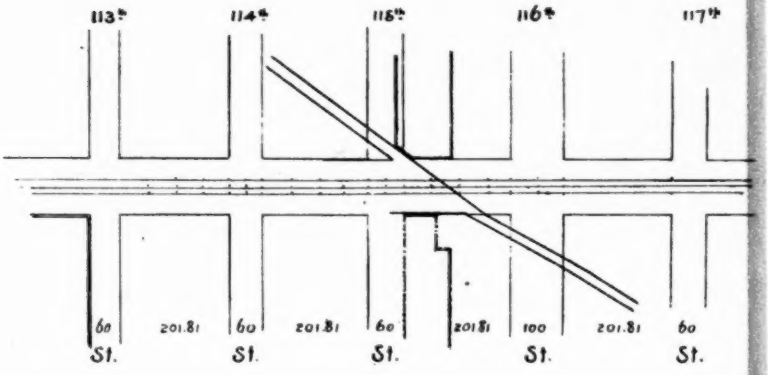

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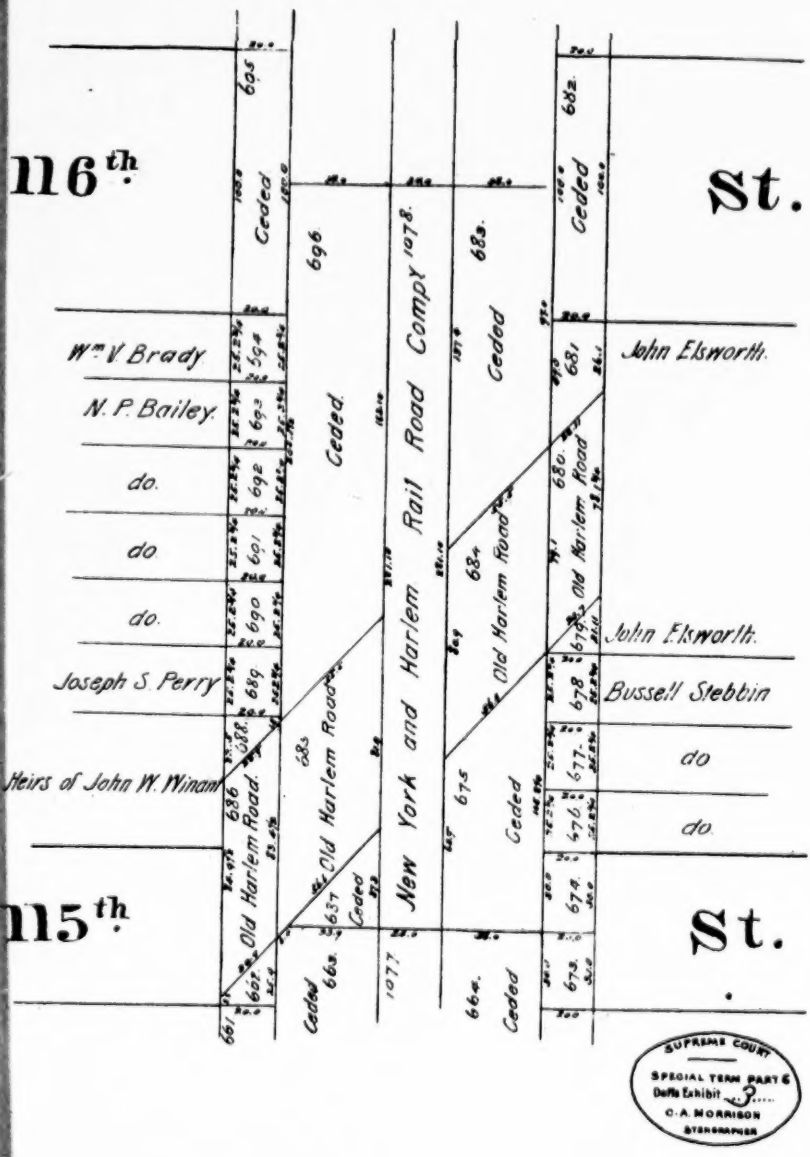
Mulliken
N.Y.H.R.R.Co.
} p. 113



SUPREME COURT
SPECIAL TERM PART 6
Defts Exhibit 3
C. A. MORRISON
STENOGRAPHER

112 DEFENDANTS' EXHIBIT 3.

Copy of a part of a map entitled: "Map of the property required for the opening and widening of Fourth avenue from 38th to 135th street, New York, 1850, by Isaac T. Ludlam, city surveyor."

(Here follows diagram marked p. 113.)

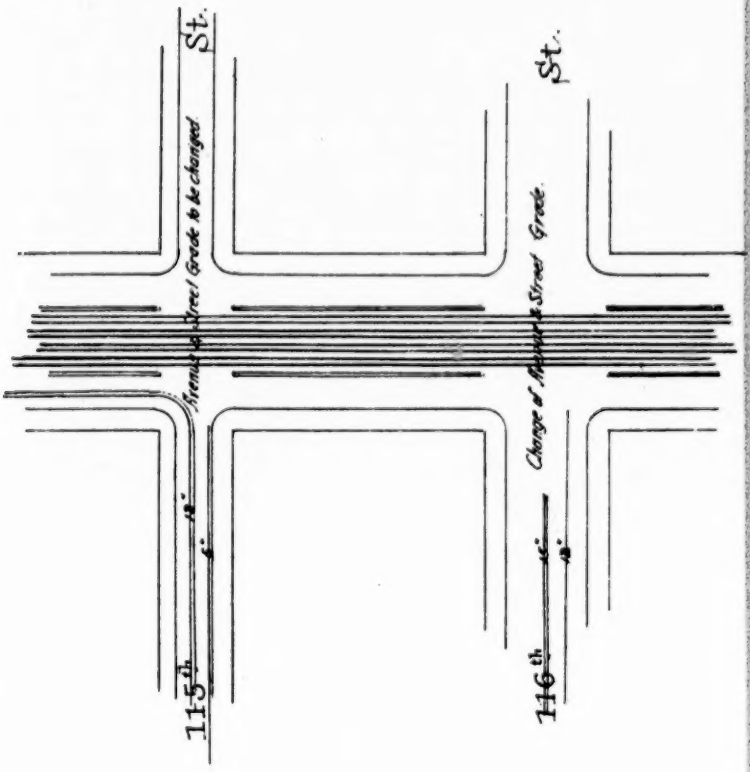
114 DEFENDANTS' EXHIBIT 5.

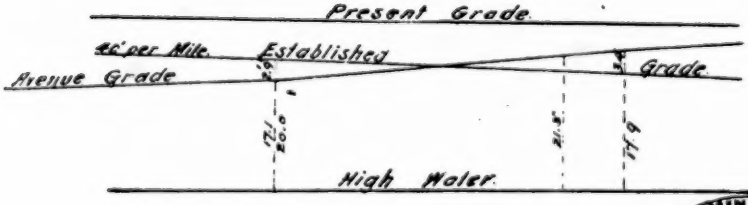
Copy of a part of a map entitled "Plan and profile of work to be done in conformity with the provisions of section 6 of the act entitled 'An act to improve and regulate the Fourth avenue in the city of New York,' passed May 14, 1872," and upon which is endorsed:

"By order of the board, New York, June 26, 1872. I. C. Buckhout, superintending engineer, 4th Ave. improvement."

(Here follows diagram marked p. 115.)

No 38
Muhlker
My. F. H. R. Co.
p. 115





SUPREME COURT
SPECIAL TERM PART 6
Defts Exhibit 5
C. A. MORRISON
STENOGRAPHER

116 New York and Harlem railroad.

Articles of agreement made this ninth day of January, one thousand eight hundred and thirty-two, between the New York and Harlem Railroad Company, parties of the first part, and the mayor, aldermen and commonalty of the city of New York, parties of the second part.

Whereas, an ordinance of the common council of the city of New York was passed by the board of aldermen on the sixteenth day of December, last, and by the board of assistants on the 19th day of December last, and approved by the mayor of said city on the twenty-second day of December last, which ordinance is in words and figures following, to wit:

A law to authorize the New York and Harlem Railroad Company to construct their railway.

Section 1. Be it ordained, etc., That the New York and Harlem Railroad Company be, and they hereby are, permitted to construct and lay down, in pursuance of their act of incorporation, a double or single track or railroad, or railway, along the Fourth avenue, from Twenty-third street to the Harlem river, in conformity with a map now on file in the register's office, and a branch thereof along One hundred and twenty-fifth street from the Fourth avenue to the Hudson river, provided that the width of such double railroad or way shall not exceed twenty-four feet.

Section 2. And be it further ordained, That if, at any time after the construction of the aforesaid railways by the said New York and Harlem Railroad Co., it shall appear to the mayor, alder-
117 men and commonalty of the city of New York, that the said railways, or any part thereof, shall constitute an obstruction or impediment to the future regulation of the city, or the ordinary use of any street or avenue (of which the said mayor, aldermen and commonalty shall be the sole judges), the said railroad company, or the directors thereof, shall, on the requisition of the said mayor, aldermen and commonalty, forthwith provide a remedy for the same, satisfactory to the said mayor, aldermen and commonalty; or, if they fail to find such remedy, they shall, within one month after such requisition, proceed to remove such railway, or obstruction or impediment, and to replace the street or avenue in as good condition as it was before the said railway was laid down; and, should the said directors decline or neglect to obey such requisition, the said mayor, aldermen and commonalty, may, upon the expiration of the time limited in such notice, cause the obstruction or impediment to be removed, and the avenues or streets restored as aforesaid, at the expense of the said railroad company.

Section 3. That the right of regulating the description of power to be used in propelling carriages on and along said railways, and

the speed of the same, as well as all other power reserved to the said mayor, aldermen and commonalty, by the act of incorporation of the said company, or any part thereof be, and the same are hereby, expressly retained and reserved.

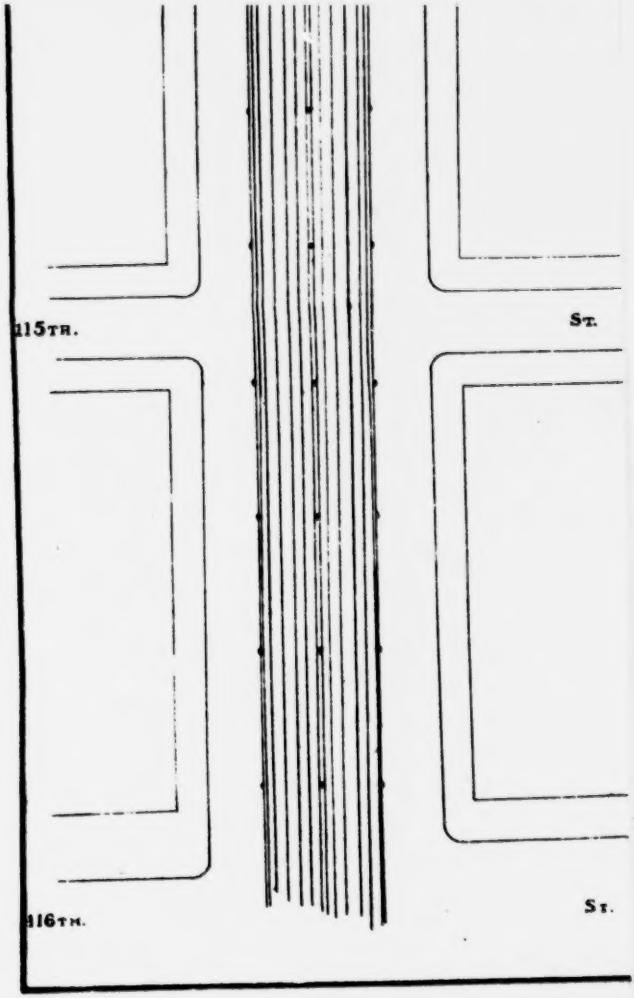
SECTION 4. That it shall expressly be incumbent on the said New York and Harlem Railroad Company, at their own cost, to construct stone arches and bridges for all the cross streets now or hereafter to be made (which will be intersected by the embankments or
118 excavations of the said railroad), and which, in the opinion of the common council, the public convenience requires to be arched or bridged, and also to make such embankments or excavations as (in the opinion of the common council) may be required to make the passage over the railroad and embankments, at the intersected cross streets easy and convenient for all the purposes for which streets and roads are usually put to; and also, that the said company shall make at their own like cost and charges, all such drains and sewers as their embankments and excavations may (in the opinion of the common council) make necessary; all which work to be done under the like requisition, and under like disabilities, as in the second section of this ordinance mentioned. And further, that the said company shall make their railroad path, from time to time, conform to what may hereafter be the regulation of the avenue and road through which said railroad passes.

SECTION 5. That it shall be incumbent on the said New York and Harlem Railroad Company to commence and complete their said railroad in the respective times allowed for that purpose in their act of incorporation; and unless they commence and complete the same in the periods of time for the said commencement and completion in said incorporation specified, that then the consent of the common council, and all the powers and privileges given in this ordinance, shall cease and be null and void.

SECTION 6. That in case the said railroad should not be completed within the times for that purpose in their charter mentioned, or, if any time after the construction of the said railroad, the same should be discontinued, or not kept up and in repair as a good and sufficient railroad, that then the strip of land to be taken for the
119 said railroad should be thrown open and become a part of the street or public avenue, without any assessment on the owners of the adjoining land or the public therefor.

SECTION 7. That no building shall be erected on the said strip of land to be taken for said railroad, and that a railing or other erections shall be made on the outer edges of the embankments or railroad path, and also such railing or fences on the edges of the excavations, as the common council shall, from time to time, deem necessary to prevent accidents and loss of lives to our fellow-citizens.

SECTION 8. That this ordinance shall not be considered as binding on the common council, nor shall the said ordinance go into effect until the said Harlem Railroad Company shall first duly execute (under their corporate seal) such an instrument in writing (promising, covenanting and engaging, on their part and behalf, to


115TH.
ST.
116TH.
ST.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

stand to, abide by and perform all the conditions and requirements in this ordinance contained) as the mayor and the counsel of the board shall, by their certificate approve, and not until such instrument shall be filed, so certified, in the comptroller's office of this city.

Passed by the board of aldermen, December 16, 1831.

Passed by the board of assistants, December 19, 1831.

Approved by the mayor, December 22, 1831.

Now, this agreement witnesseth, that for and in consideration of the premises, and in pursuance of the requirements of the eighth section of said ordinance, the said parties of the first part do hereby for themselves and their successors, promise, covenant and engage to and with the said parties of the second part and their successors and assigns, to stand, abide by and perform all the conditions and requirements in the said ordinance contained. 120–122

In witness whereof the said parties of the first part have hereunto affixed their corporate seal, and caused the same to be signed by their vice-president (in the absence of their president), and attested by their secretary, the day and year aforesaid.

JOHN MASON, [L. S.]
Vice-President.

Witness,
ISAAC ADRIANCE,
Secretary pro Tem.

(Here follow diagrams marked pp. 123 and 124.)

125 & 126 Pursuant to section 3301 of the Code of Civil Procedure we hereby stipulate that the foregoing are copies of the judgment roll, papers, notice of appeal and case and exceptions in this action on file in the office of the clerk of the county of New York.

Dated New York, February 25", 1901.

BUSHBY & BERKELEY,
Attorneys for Plaintiff, Respondent, and Appellant.
IRA A. PLACE,
Attorney for Defendants, Appellants, and Respondents.

It is hereby consented that the within-printed case on appeal may be ordered filed as and for the original case on appeal, as settled herein.

Dated New York, February 25", 1901.

BUSHBY & BERKELEY,
Attorneys for Plaintiff, Respondent, and Appellant.
IRA A. PLACE,
Attorney for Defendants, Appellants, and Respondents.

It is so ordered.

Dated New York, February 25", 1901.

DAVID LEVENTRITT, *J. S. C.*

127 At a term of the appellate division of the supreme court for the first department, held at the court house in the county of New York, on the 19th day of April, 1901.

Present: Hon. Charles H. Van Brunt, presiding justice.
" William Rumsey,
" Morgan J. O'Brien,
" Chester B. McLaughlin, justices.

HENRY MUHLKER, Plaintiff, Appellant, and Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Defendants, Respondents, and Appellants. } Order.

The above-named plaintiff and the above-named defendants having appealed to the appellate division of the first department from the judgment herein entered in the office of the clerk of New York county on the 3d day of November, 1900, for an injunction and for $1,400 damages, with interest and costs, and said appeals coming on to be heard; now, after hearing James C. Bushby, Esq., of counsel for the plaintiff, and Ira A. Place, Esq., of counsel for the defendants, and due deliberation having been had, it is

Ordered that the said judgment be, and the same hereby is, affirmed, without costs to either party.

128 Supreme Court, County of New York.

HENRY MUHLKER, Plaintiff, Appellant, and Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Defendants, Respondents, and Appellants. } Judgment.

The above-named plaintiff and the above-named defendants having appealed to the appellate division of the first department from the judgment herein entered on the 3d day of November, 1900, for an injunction and for $1,400 damages, with interest and costs, and said appellate division having ordered said judgment to be affirmed without costs to either party, it is

Adjudged, that the said judgment be, and the same hereby is, affirmed without costs to either party.

Judgment signed and entered this 29th day of April, 1901.

WM. SOHMER, *Clerk*.

129 Supreme Court, Appellate Division, First Department, April, 1901.

Chas. H. Van Brunt, P. J., William Rumsey, Morgan J. O'Brien, Chester B. McLaughlin, JJ.

HENRY MUHLKER, Appellant,
vs.
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Appellants. } No. 3027.

Cross appeals from a judgment entered upon a decision after trial at special term.

Mr. James C. Bushby, for plaintiff-appellant.
Mr. Ira A. Place, for defendants-appellants.

MCLAUGHLIN, *J.*:

This action was brought to recover damages resulting from the operation of defendants' railroad in front of plaintiff's premises on Park avenue in the city of New York, and to enjoin the future operations of such road.

The plaintiff had a judgment restraining the defendants from interfering with his easements of light, air and access to the premises

in question and fixing the amount of the fee and rental dam-
130 ages because of such prior interference. The judgment was in the usual form in actions brought for a similar purpose against the elevated railroad companies in such city, and provided that if the defendants within a time specified paid the amounts awarded for fee and rental damages that then the injunction should not become operative.

The facts established upon the trial, so far as the same relate to the plaintiff's right to recover at all, are substantially the same as those established upon the trials in Lewis *vs.* The New York & Harlem Railroad Co. (162 N. Y., 262), Fries *vs.* The New York & Harlem Railroad Co. (57 App. Div., 577), and Sanders *vs.* The New York & Harlem Railroad Co. (decided by this court March 8, 1901, and not yet reported, and for that reason it is unnecessary to re-state them here).

The origin of the defendants' claim to so much of the premises upon which their road stands as lies south of the "Old Harlem road" is precisely like the Lewis case, and the origin and source of plaintiff's title and of defendants' claim to premises lying north of the "Old Harlem road" are in all respects like the Sanders case; and the liability of the defendants to respond in damages from February 16, 1897, when they began to operate trains upon the steel viaduct, in so far as such operation interfered with the easements of light, air and access, was settled by the Lewis case, which was followed in both of the other cases cited.

The question of defendants having acquired title by adverse possession was considered by this court in both the Fries and Sanders cases. In the former it was said, "For these reasods the deed to the city was valid as against the railroad company, and it had no title to that part of the street in front of the plaintiff's premises, and its only rights, therefore, were those which it had acquired by
131 adverse possession. Within the rule laid down in the case of Lewis *vs.* New York & Harlem R. R. Co. (cited above), that adverse possession did not give to the railroad company the right to carry its tracks, which for twenty years had run in a cut, upon a viaduct such as this is above ground, in front of the plaintiff's premises. The case of Lewis applies fully to the one at bar." In the Sanders case this court followed the decision just quoted, the presiding justice dissenting on the sole ground that "Title by adverse possession as to the twenty-four feet strip, at least, was established by the evidence." * * * It is urged, however, that an error was committed in the admission of evidence as to the course of values of real estate on Madison and Lexington avenues subsequent to the year 1892. But a similar question was presented to and passed upon by a majority of this court in the Fries case, and it was there held that the evidence was not incompetent. It is also urged that the fee and rental damages awarded are excessive. A careful consideration of the evidence bearing upon that subject fails to sustain such contention. There is sufficient evidence to sustain the finding of the special term in this respect.

The judgment is right and should be affirmed, and inasmuch as both parties appeal from the judgment, we are of the opinion that costs should not be awarded to either of them.

Rumsey & O'Brien, J. J., concur.

Van Brunt, P. J., dissents.

132 Supreme Court, New York County.

HENRY MUHLKER, Plaintiff-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Defendants-Appellants.
} Notice of Appeal to Court of Appeals.

SIRS: Please take notice that the defendant- above-named, and each of them, hereby appeal to the court of appeals from the judgment of the appellate division of the supreme court, first department, entered in the office of the clerk of New York county on the 29th day of April, 1901, upon an order entered in the office of the clerk of the said appellate division on the 27th day of April, 1901, adjudging that the judgment entered in this action in the office of the clerk of New York county on the 3d day of November, 1900, in favor of the above-named plaintiff and against the defendants, which judgment awarded the plaintiff herein an injunction unless the defendants paid the sum of three thousand dollars fee damages, and further awarded the plaintiff a money judgment against the defendants for the sum of eighteen hundred and sixty-one and 88/100 dollars, be affirmed, with one hundred and twenty-two and
133 35/100 dollars cost to the plaintiff, and from each and every part of said judgment.

Dated borough of Manhattan, N. Y. city, N. Y., June 12, 1901.

Yours, &c.,
IRA A. PLACE,
Attorney for Defendants-Appellants.

Office and post office address, room 417, Grand Central station, borough of Manhattan, N. Y. city, N. Y.

To William Sohmer, Esq., county clerk of the county of New York, county court house, borough of Manhattan, N. Y. city, N. Y.; and Bushby & Berkeley, Esqs., attorneys for plaintiff-respondent, 220 Broadway, borough of Manhattan, N. Y. city, N. Y.

134 Supreme Court, County of New York.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD Company *et al.*, Defendants.
} Notice of Appeal to Court of Appeals.

Please take notice that the above-named plaintiff hereby appeals to the court of appeals from the judgment of the appellate division

of the supreme court for the first department, entered herein on April 29, 1901, in the office of the clerk of New York county, affirming the judgment of the special term of the supreme court entered herein on November 3, 1900, in the office of said clerk, and from each and every part of the said judgment of the appellate division.

Dated New York, June 17, 1901.

Yours, &c., BUSHBY & BERKELEY,
Attorneys for Plaintiff.

Office and post office address, 220 Broadway, borough of Manhattan, New York city.

To Ira A. Place, Esq., attorney for defendants. William Sohmer, clerk of New York county.

135 In the Court of Appeals.

HENRY MUHLKER, Plaintiff, Respondent, and Appellant,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants, Appellants, and Respondents.

It is hereby stipulated, under section 3301 of the Code of Civil Procedure, that the foregoing are true copies of the judgment roll, papers, notices of appeal to the appellate division of the supreme court, case and exceptions, of the order of the appellate division and of the judgment entered thereon, and of the notices of appeal to the court of appeals, on file in the office of the clerk of the county of New York, and certification thereof, as required by section 1353 of the Code of Civil Procedure, is hereby waived.

Dated borough of Manhattan, N. Y. city, N. Y., June 22, 1901.

BUSHBY & BERKELEY,
Attorneys for Plaintiff, Respondent, and Appellant.
IRA A. PLACE,
Attorney for Defendants, Appellants, and Respondents.

136 UNITED STATES OF AMERICA:

Supreme Court.

STATE OF NEW YORK, } ss:
County of New York, }

I, Thomas Hamilton, clerk of the county of New York and of the supreme court in said county, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the foregoing pages, ending with No. 135, contain a true and complete transcript of the record and proceedings had in said supreme court and in the court of appeals of the State of New York in the cause

of Henry Muhlker, plaintiff in error and plaintiff below,, against The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, defendants in error and defendants below, as the same remain of record and on file in said office and that the same, together with the annexed original petition for said writ of error, the assignment of errors, the original citation to the defendants in error and undertaking to prosecute said writ of error and copy of the opinion of the said court of appeals, all of which were filed in the office of said clerk on the twenty-ninth day of July, 1903, and constitute the return to said writ of error.

M. J. D.

In testimony whereof, I have hereunto set my hand and affixed the seal of said supreme court this 29th day of July, A. D. 1903.

[Seal New York.]

THOS. L. HAMILTON,
Clerk of the Supreme Court in the County of New York.

137 [Endorsed:] U. S. Supreme Court. Henry Muhlker, plaintiff in error, against The N. Y. & Harlem R. R. Co., defendants in error. Return to writ of error. Bushby & Berkeley, attorneys for plaintiff in error. Office and post office address, 220 Broadway, borough of Manhattan, New York city.

138 Supreme Court, New York County.

HENRY MUHLKER, Plaintiff,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Defendants.

The judgment herein, in favor of the plaintiff and against the defendants, having been entered in this court on the 3d day of November, 1900, upon a decision of the Hon. David Leventritt, J., for an injunction and for the sum of one thousand nine hundred and eighty-four and twenty-three hundredths dollars ($1,984.23), and the plaintiff and defendants each having appealed from said judgment to the appellate division of the supreme court for the first department, and the said judgment having been affirmed by the said appellate division and judgment of affirmance having been accordingly entered therein on the 29th day of April, 1901, and the said plaintiff and defendants each having appealed therefrom to the court of appeals, and the said court of appeals having sent hither its remittitur, filed herein on the 3d day of March, 1903, by which it appears that the said court of appeals has reversed the said judgment so appealed from, without costs, and has given judgment accordingly, and has remitted its said judgment to this court to be enforced ac-

cording to law, and this court having, by order dated the 4" day of March, 1903, and duly entered herein, ordered that the said judgment of the court of appeals be made the judgment of this
139 court; now, on motion of Ira A. Place, Esq., attorney for the defendants herein, it is

Adjudged, that the judgment of said court of appeals be, and the same hereby is, made the judgment of this court; and it is further

Ordered and adjudged, that the said judgments of the supreme court herein so appealed from be, and the same hereby are, reversed and the complaint dismissed, without costs.

Judgment signed and entered this 5th day of March, 1903.

THOS. L. HAMILTON, *Clerk.*

140 [Endorsed:] Supreme court. Henry Muhlker plaintiff, against The New York Central & Hudson River Railroad Company *et al.*, defendants Copy Judgment. Ira A. Place attorney for defendants, 417 Grand Central station, borough of Manhattan, New York city. To Bushby & Berkeley, Esqs. attorneys for plaintiff. Due and timely service of a copy of the within judgment & notice of entry is hereby admitted. Dated March — 1903. —— —— attorney for plaintiff. Rec'd M'ch 5, 1903.

[Endorsed:] Sirs: Please take notice that the within is a copy of a judgment duly entered herein, and filed in the office of the clerk of the county of New York on the 5th day of March 1903. Dated March 5th 1903 Yours, &c., Ira A. Place attorney for defendants, 417 Grand Central station, borough of Manhattan, New York city. To Bushby & Berkeley, Esqs. attorneys for plaintiff, 220 B'way.

141 At a special term of the New York supreme court, held in part II. in the county court house of New York county on the 15th day of June, 1903.

Present: Hon. Charles H. Truax, justice.

HENRY MUHLKER, Appellant-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Respondents-Appellants. } Order.

Upon reading and filing the annexed affidavit of James C. Bushby, and the annexed copy of the order of the court of appeals, directing the remittitur herein to be returned to that court, and on motion of Messrs. Bushby & Berkeley, attorneys for plaintiff, it is

Ordered that the clerk of this court deliver the remittitur herein, filed March 4, 1903, to the plaintiff's attorneys for transmission to the court of appeals pursuant to said order.

Enter,

C. H. T., *J. S. C.*

142 Supreme Court, County of New York.

HENRY MUHLKER, Appellant-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Respondents-Appellants. } Affidavit.

STATE AND COUNTY OF NEW YORK, *ss:*

James C. Bushby, being duly sworn, says that he is one of the attorneys for the plaintiff herein; that this case was appealed to the court of appeals, and was thereafter decided by said court, and the remittitur therefrom was filed in the office of the county clerk of New York county on March 4, 1903; that subsequently the plaintiff's attorneys moved in the court of appeals to amend said remittitur, and the said motion was granted, and the said remittitur was ordered to be returned, as more fully appears from the order of the court of appeals, a certified copy of which is hereto annexed; and that no previous application has been made for this order.

JAMES C. BUSHBY.

Sworn to before me this 15th day of June, 1903.

FRANK G. SWARTWOUT,
Notary Public, N. Y. Co.

143 STATE OF NEW YORK:

In Court of Appeals.

At a court of appeals for the State of New York, held at the capitol in the city of Albany, on the fifth day of June, A. D. 1903.

Present: Hon. Alton B. Parker, chief judge, presiding.

HENRY MUHLKER, Appellant-Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE New York Central and Hudson River Railroad Company, Respondents-Appellants.

A motion having been heretofore made upon the part of the plaintiff herein for the return of the remittitur heretofore issued herein and to amend the same by inserting therein a recital showing that upon the argument of the above case in this court the plaintiff raised the following points, namely:

(1.) That chapter 339 of the New York Laws of 1892, and the acts amendatory thereof, violate section 1 of article XIV of the amendments to the United States Constitution, in that the said acts deprive the plaintiff of property without due process of law, which

said property consists of rights and easements of light, air, and access in and over Park (or Fourth) avenue in the city of New York, the said rights and easements being appurtenant to the plaintiff's premises abutting on said avenue.

(2.) That chapter 339 of the New York Laws of 1892, and the acts amendatory thereof, violate section 10 of article 1 of the United States Constitution, in the respect that the said acts impair the obligation of a contract, to wit, the contract under which Park (or Fourth) avenue in the city of New York was dedicated as a public street in and by the deed from Peter Poillon to the mayor, aldermen and commonalty of the city of New York, dated July 24, 1827; and in the further respect that the said acts impair the obligation of the contract existing among the parties to this action, and arising from the fact that the said parties all claim title under said Poillon through conveyances which recognize the character of said avenue as a public street, and which refer to public maps whereon said avenue is so represented.

And papers having been duly submitted thereon; and due deliberation having been thereupon had: it is

Ordered that said motion be and the same is hereby granted and the remittitur is ordered recalled in order that there may be inserted therein the clauses necessary to make the remittitur in this case the same as the remittitur in the cases of Kriete, O'Neil and Scholz against this defendant, decided June 2nd, 1903.

(A copy.)

[SEAL.] W. H. SHANKLAND, *Clerk.*

144 [Endorsed:] N. Y. supreme court. Henry Muhlker, plaintiff, against The N. Y. & Harlem R. R. Co. *et al.*, defendants. (Copy) Affidavit & order for return of remittitur. Bushby & Berkeley, attorneys for pl'ff, office and post office address, 220 Broadway, borough of Manhattan, New York city.

145 In the Supreme Court of the United States.

HENRY MUHLKER, Original Plaintiff and Plaintiff in Error,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY and The New York Central and Hudson River Railroad Company, Original Defendants and Defendants in Error.

Petition for Writ of Error.

To the Supreme Court of the United States:

The petition of Henry Muhlker respectfully shows that your petitioner, being the owner of certain valuable land and premises situate in the borough of Manhattan, city, county and State of New York, and abutting upon Park avenue, a public street in said borough, and city, was at the times hereinafter mentioned the owner

of certain property rights or easements in said avenue of light, air, access, etc.; that at or prior to the commencement of the above-entitled original suit or action the defendants therein, being the defendants in error above-named, The New York & Harlem Railroad Company and The New York Central and Hudson River Railroad Company, began to maintain and operate a permanent elevated railroad in said street or avenue in front of your petitioner's said premises.

That on or about January 7, 1897, your petitioner commenced said action against said defendants in the supreme court of the State of New York to recover the damages sustained by your petitioner by said maintenance and operation, whereby your petitioner claimed that his said property rights or easements had been permanently taken and impaired by said defendants, unlawfully and with-
146 out due compensation, and to recover an injunction against the further maintenance and operation of said elevated railroad, as appears by the complaint of your petitioner in said action. Said defendants appeared and as a defense to the said complaint, in said original suit or action, interposed an answer setting up in substance the provisions of certain acts of the legislature of the State of New York, namely, chapter 339 of the Laws of 1892, and other acts amendatory thereof, as command and authority to defendants to maintain and operate said elevated railroad without liability to compensate your petitioner for the value of his property rights taken as aforesaid.

That under the practice in said New York supreme court, no further pleading and no reply to said defense was allowed or required.

That said action came to trial thereafter in said supreme court at a special term thereof on the 8th day of October, 1900 before Hon. David Leventritt, justice, and thereupon and on November 3, 1900, the trial court overruled said defense and held the same to be invalid, and gave judgment in favor of your petitioner, the plaintiff therein, and against the said defendant railroad companies for $1,984.23 damages and costs and for an injunction, requiring said defendants to cease to appropriate further your petitioner's said property rights unless said defendants compensate your petitioner by the payment to him of $3,000, adjudged to be the value of said property rights so appropriated.

That upon appeal duly taken by both parties to the appellate division of the supreme court for the first department, the said judgment was duly affirmed and judgment of affirmance thereof entered on April 29, 1901.

That from said judgment of affirmance both parties thereupon appealed to the court of appeals of the State of New York, the same being the highest court of said State in which a de-
147 cision in the suit could be had. Whereupon the said court of appeals on February 24, 1903, made a final judgment or decree in said suit or action directing that the said judgment of the appellate division of the supreme court, so appealed from be re-

versed and plaintiff's complaint be dismissed and that the record be remitted to the supreme court of the State of New York to be enforced according to law. That said record was thereupon so remitted accordingly, and thereafter on March 5, 1903, final judgment was entered in and by said supreme court in obedience to the judgment of the court of appeals, and according to the law and practice of the State of New York, whereby it was adjudged that said judgment of the court of appeals be made the judgment of the supreme court, and that the judgment previously rendered in favor of your petitioner by said supreme court be reversed and your petitioner's complaint be dismissed as aforesaid.

That in said court of appeals there was drawn in question the validity of the said statutes of the State of New York and the authority exercised thereunder by defendants on the ground of their being repugnant to the Constitution of the United States and the decision was in favor of their validity. That in said court of appeals it was claimed by your petitioner that the said acts of the legislature directed the taking of his private property without due process of law and therein offended against the provisions of the fourteenth amendment of the Constitution of the United States, and that said acts also contravened the provisions of section 10 of article I of the Constitution of the United States, which forbid the impairing of the obligations of a contract, namely, the contract or contracts under which your petitioner's said easements were created and exist.

That thereupon said court of appeals in said suit or action and in its decision therein overruled the said claims
148 of your petitioner and decided in favor of the validity of said statutes and the authority exercised thereunder, to the prejudice of your petitioner, all of which will more in detail appear from the record and assignment of errors herein.

Wherefore, your petitioner prays for a writ of error directed to the supreme court of the State of New York, commanding that court to send a record of the proceedings in the said suit or action aforesaid, and all things concerning the same, to the justices of the Supreme Court of the United States and for the usual citation, to the end that the record of the proceedings being inspected the said justices of the Supreme Court of the United States may cause further to be done therein to correct all errors what of right and according to the law and Constitution of the United States ought to be done.

And your petitioner will ever pray.

Dated, July 18th, 1903.

JAMES C. BUSHBY AND
L. M. BERKELEY,
Attorneys for Plaintiff in Error, 220 Broadway, Manhattan Borough, New York City.
HENRY G. ATWATER,
Of Counsel.

STATE OF NEW YORK, *County of New York,* } *ss:*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Henry Muhlker, being duly sworn, says: That he is the plaintiff in error herein; that the foregoing petition is true to the best of his knowledge information and belief.

HENRY MUHLKER.

Sworn to before me this 18th day of July, 1903.

[Seal of John F. Forrester, Notary Public, New York County.]

JOHN F. FORRESTER,
Notary Public, New York County.

Allowed this 27th, day of July, 1903.

ALTON B. PARKER,
Chief Judge of the Court of Appeals of the State of New York.

149 [Endorsed:] U. S. Supreme Court. Henry Muhlker, plaintiff in error, against The N. Y. & Harlem R. R. Co., & ano. defendants in error. Petition for writ of error. Bushby & Berkeley, attorneys for plaintiff in error Office and post office address, 220 Broadway, borough of Manhattan, New York city. Rend. July 20, 1903. Alton B. Parker, ch. J. Service of a copy of the within petition with notice of allowance is hereby admitted. Dated July 27, 1903. Ira A. Place attorney and solicitor for defendants in error and defendants below, The New York and Harlem Railroad Company and The New York Central and —.

150 In the Supreme Court of the United States.

HENRY MUHLKER, Original Plaintiff and Plaintiff in Error,
against
THE NEW YORK AND HARLEM RAILROAD Company and The New York Central and Hudson River Railroad Company, Original Defendants and Defendants in Error.
} Assignment of Errors.

Afterwards, to wit, on the eighteenth day of July, in the year of our Lord, one thousand nine hundred and three, in this same term before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes Henry Muhlker, the plaintiff in error and plaintiff below, and by his attorneys James C. Bushby and L. M. Berkeley, and his counsel Henry G. Atwater, says:

That in the record, proceedings, decision and final judgment of the court of appeals of the State of New York, and of the supreme court of the State of New York aforesaid, in the above entitled suit or action, there is manifest error in this, to wit:

I. That by the record, aforesaid, it appears that the judgment aforesaid given, was given by the court of appeals of the State of New York against the said Henry Muhlker, plaintiff in error, and in favor of The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, defendants in error; whereas, by the law of the land the said judgment ought to have been given for the said Henry Muhlker against the said New York and Harlem Railroad Company and the New York Central and Hudson River Railroad Company.

151 II. That the said court of appeals of the State of New York erred in holding and deciding that the complaint of the plaintiff in error herein and plaintiff below should be dismissed.

III. That the said court of appeals of the State of New York erred in holding and deciding that, under the statute authorizing or requiring the erection and maintainance of the elevated railroad structure and the operation thereon of trains as complained of by the plaintiff in error and plaintiff below herein, the said plaintiff has no remedy against the defendants in error and defendants below, herein; thereby holding and deciding that the said plaintiff might be and has been deprived of his property by said defendants without due process of law; the said court of appeals, thus holding and deciding in violation of the Constitution of the United States and especially of section I, article XIV of the amendments to said Constitution.

IV. That the said court of appeals of the State of New York erred in holding that chapter 339 of the Laws and Statutes of 1892 of the State of New York, is constitutional and that it does not offend against that portion of the fourteenth amendment of the Constitution of the United States, providing that a person shall not be deprived of property without due process of law; whereas in fact and in law the said act and statute is repugnant to section I, of article XIV of the amendments to the Constitution of the United States; and further that whereas the property of the said plaintiff, as shown by said record and proceedings consists of rights and easements of light, air and access in and over Park or Fourth avenue, a public street in the city of New York, appurtenant to the premises of the said plaintiff in error, abutting on said avenue, the said court of appeals of the State of New York erred in deciding in favor

152 of sustaining the validity of said act and statute of said State, the effect of which has been to deprive said plaintiff of said property without due process of law.

VI. That the said court of appeals of the State of New York erred in holding and deciding in favor of the validity of the authority exercised under chapter 339 of the Statutes of 1892 of the State of New York, namely, the authority to take by or on behalf of the defendants in error and defendants below, the said plaintiff's property,

consisting of rights and easements of light, air and access appurtenant to his said premises, without compensation to him and without due process of law, in violation of section I of article XIV of the amendments to the Constitution of the United States.

VII. That the said court of appeals of the State of New York erred in holding and deciding that the said State had authority and that the authority exercised by the State and under the statute aforesaid was valid to compel or allow defendants in error to maintain a railroad viaduct and to operate trains of cars thereon in front of the said property rights and easements, of the said plaintiff in error and that the said defendants in error were under no liability to compensate said plaintiff in error therefor, or for the injury inflicted upon his said premises by reason of such maintenance and operation, and that the taking of a portion of the property of the plaintiff in error in the manner complained of, was and could be made valid by statute, that is by chapter 339 of the Laws of 1892 of the State of New York; and that said holding and decision of said court of appeals, was, and is repugnant to section I of article XIV of the amendments to the Constitution of the United States.

VIII. That the said court of appeals of the State of New York erred in holding that chapter 339 of the New York Laws of 1892 is constitutional and that it does not contravene section 10 of
153 article I of the Constitution of the United States forbidding the impairment of the obligation of contracts; whereas in fact and in law the said act is repugnant to the said section in that it does impair the obligation of a contract, namely, the contract under which Park or Fourth avenue in the city of New York was dedicated as a public street in and by the deed from Peter Poillon to the mayor, aldermen and commonalty of the city of New York, dated July 24th, 1827, and set forth in the record of the proceedings herein; and said statute further impairs the obligation of the contract existing among the parties to this action arising from the fact that the said parties all claim title under said Peter Poillon through conveyances which recognize and establish the property rights of the plaintiff in error as aforesaid.

IX. That the said court of appeals of the State of New York erred in holding and deciding in favor of the validity of the authority exercised under said statute and under chapter 339 of the Laws of the State of New York, of the year 1892, whereby the easements and rights of the property of the plaintiff in error aforesaid were taken and appropriated by defendants in error and thereby he was deprived of said property rights and easements without compensation, for the reason that said authority was repugnant to section 10 article I of the Constitution of the United States, in the respect that it impairs the obligation of said contracts in last assignment referred to.

X. That the said court of appeals of the State of New York erred in holding and deciding that the defendants in error were and are under no liability to compensate the plaintiff in error for the damages and injury inflicted upon his said premises by reason of either the erection, maintenance and operation of said viaduct structure or the

operation of trains in front of plaintiff's premises and in holding and deciding that said defendants were and are protected from
154 such liability by the authority of a statute of said State, namely, chapter 339 of the Laws of 1892 thereof, such decision being repugnant to the Constitution of the United States and to section 10 of article I and to section I of article XIV thereof.

Wherefore, the said Henry Muhlker, plaintiff in error and plaintiff below, prays that the said judgment of the said court of appeals of the State of New York be reversed, annulled and altogether held for nothing and that he may be restored to all things which he has lost by occasion of the said judgment, etc., and that he may have such other and further relief, according to law, as to the court may seem just and proper.

JAMES C. BUSHBY AND
L. M. BERKELEY,
Attorneys for Plaintiff in Error,
220 *Broadway, Borough of Manhattan, New York City.*
HENRY G. ATWATER,
Of Counsel.

155 [Endorsed:] U. S. Supreme Court. Henry Muhlker plaintiff in error, against The N. Y. & Harlem R. R. Co., and ano., defendants in error. Assignment of errors. Bushby & Berkeley, attorneys for pl'ff in error Office and post office address, 220 Broadway, borough of Manhattan, New York city. Service of a copy of the within assignment of errors is hereby admitted. Dated New York July 27, 1903. Ira A. Place attorney and solicitor for defendants in error and defendants below, The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company.

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Citation.

UNITED STATES OF AMERICA, *ss:*

To the New York and Harlem Railroad Company and the New York Central and Hudson River Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of New York for the county of New York, wherein Henry Muhlker is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the

said Supreme Court of the United States, this 27th day of July, in the year of our Lord one thousand nine hundred and three.

ALTON B. PARKER,
Chief Judge of the Court of Appeals of the State of New York.

157 [Endorsed:] U. S. Supreme Court. Henry Muhlker, plaintiff in error, against The N. Y. & Harlem R. R. Co., *et al*, defendants in error. Citation. Bushby & Berkeley, attorneys for plaintiff in error, Office and post office address, 220 Broadway, borough of Manhattan, New York city. Service of a copy of the within citation with notice of allowance is hereby admitted. Dated, New York, July 27, 1903. Ira A. Place attorney and solicitor for defendants in error, The New York and Harlem R. R. Co., and The New York Central and Hudson River Railroad Co.

158 Know all men by these presents, that we, Henry Muhlker of the city, county and State of New York, as principal, and American Bonding Company of Baltimore, having an office and principal place of business for the State of New York, at No. 253 Broadway, in the borough of Manhattan, in the city of New York, as surety, are held and firmly bound unto the New York and Harlem Railroad Company and the New York Central and Hudson River Railroad Company, both corporations organized under the laws of the State of New York, in the full and just sum of five hundred dollars, to be paid to the said The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company their certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of July, in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a plea in the court of appeals of the State of New York, held at Albany, N. Y. on February 24, 1903, in a suit depending in the supreme court of the State of New York, between the said Henry Muhlker, plaintiff, and The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, defendants, a judgment upon return from said supreme court was rendered against the said Henry Muhlker and in favor of the said The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company dismissing his complaint, without costs, and the said Henry Muhlker having obtained a writ of error, and filed a copy thereof in the clerk's office of the said supreme court to reverse the judgment in the aforesaid suit, and a citation directed to the said The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washing-
159 ton, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Henry Muhlker shall prosecute said writ of error to effect,

and answer all costs if he fail to make the said plea good, then the above obligation to be void; else to remain in full force and virtue.

HENRY MUHLKER. [SEAL.]
AMERICAN BONDING COMPANY
OF BALTIMORE,
By HOWARD ABRAHAMS,
Vice President.

Attest: D. C. MACKEY,
Assistant Secretary.

[Seal American Bonding Company of Baltimore. Incorporated 1894.]

Sealed and delivered this 18th day of July, 1903, in presence of—
JAMES C. BUSHBY.
HULBERT T. E. BEARDSLEY.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

On the 18th day of July, 1903, before me personally came Howard Abrahams, to me known, who, being by me duly sworn, did depose and say, that he resides in the city of New York; that he is the vice-president of American Bonding Company of Baltimore, the corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3 of chapter 720, of the Session Laws of the State of New York for the year 1893. And the said Howard Abrahams further said that he was acquainted with D. Clinton Mackey, and he knew him to be the assistant secretary of said company; that the signature of said D. Clinton Mackey, subscribed to the within instrument is the genuine handwriting of the said D. Clinton Mackey, and was subscribed thereto by like order of the board of directors, in the presence of him, the said Howard Abrahams.

[Seal of Hulbert Ten Eyck Beardsley, Notary Public, New York.]

HULBERT T. E. BEARDSLEY,
Notary Public, New York Co.

160 STATE OF NEW YORK, }
City and County of New York, } *ss:*

On the 18th day of July, 1903, before me personally came Howard Abrahams, to me known, who, being by me duly sworn, did depose and say, that he resides in the city of New York; that he is the vice-president of American Bonding Company of Baltimore, the corporation described in and which executed the within instrument; that

he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3, of chapter 720, of the Session Laws of the State of New York for the year 1893. And the said Howard Abrahams further said that he was acquainted with D. Clinton Mackey, and he knew him to be the assistant secretary of said company; that the signature of said D. Clinton Mackey subscribed to the within instrument is the genuine handwriting of the said D. Clinton Mackey, and was subscribed thereto by like order of the board of directors, in the presence of him, the said Howard Abrahams.

[Seal of Hulbert Ten Eyck Beardsley, Notary Public, New York.]

HULBERT T. E. BEARDSLEY,
Notary Public, New York Co.

Extracts from Charter of American Bonding Company of Baltimore.

"The said company shall be and is hereby authorized and empowered to insure the fidelity of persons holding places of trust or responsibility to or under any State, county, city, corporation, company, person or persons whatsoever; to become security for the faithful performance of any trust office, duty, contract or agreement, and to supersede any judgment or to go upon any appeal or other bond."

* * * * * * *

"That the directors shall * * * elect from their number * * * an executive committee."

"The executive committee so chosen * * * shall have power to elect non-resident local boards, non-resident local vice-presidents and non-resident local assistant secretaries * * * with power to sign and deliver bonds of suretyship and other obligations for and on behalf of and in the name of said company to the same effect and with the same binding obligation as if the said instrument had been executed by the president or vice-president and secretary or assistant secretary * * *"

"That the name of the said corporate body is * * * changed from 'The American Bonding and Trust Company of Baltimore City' to the 'American Bonding Company of Baltimore.'"

* * * * * * *

Extract from minutes of a meeting of the executive committee, held at the office of the company at Baltimore, Maryland, on the 10th day of November, 1902. * * *

Mr. Ernest Hoen, Jr., presented the following resolution, seconded by Mr. James S. Woodside:

"Preamble.—Whereas, in virtue of a certain resolution dated the "thirty-first day of July, 1902, Howard Abrahams and William P. "Flanders were declared, appointed or elected vice-presidents, and "Henry J. Sage, Hulbert T. E. Beardsley, Edward B. Southworth, "Jr., and D. Clinton Mackey were declared, appointed or elected "assistant secretaries, to serve in the city of New York, State of New "York; now, therefore,

"Resolved, That said appointments or election of said persons, for "reason, is hereby declared null and void, and all powers granted "under said resolution, are hereby revoked; to more definitely de- "termine the purpose and intention of said annulment and revoca- "tion, be it further

"Resolved, That Howard Abrahams of New York city, New York, "and Henry J. Sage, of the same place, be and are hereby appointed "resident vice-president and assistant secretary, respectively, of this "company at New York city, New York, with power to execute "bonds on behalf of the company for its business and in accordance "with its charter. That in the absence of the said Howard Abra- "hams, Hulbert T. E. Beardsley, of the same place, be and he is "hereby authorized to act as resident vice-president, and with the "same power as the said Howard Abrahams: and that in the ab- "sence of the said Henry J. Sage, either, Edward B. Southworth, Jr., "or D. Clinton Mackey, of the same place, be and are hereby au- "thorized to sign all bonds and undertakings issued by the company "as assistant secretary, in attestation of the seal of the company "affixed thereto."

"And on ballot, a majority of the whole committee having voted "in the affirmative, the said resolution was adopted, and the afore- "said nominees were declared to be duly elected as such officers of "the company with powers as aforesaid."

I, D. Clinton Mackey, assistant secretary of American Bonding Company of Baltimore, hereby certify that the foregoing are true and correct copies taken from the records of American Bonding Company of Baltimore.

In witness whereof, I have hereunto subscribed my name and affixed the corporate seal of American Bonding Company of Baltimore, at New York city, N. Y., this 18th day of July, 1903.

[Seal of American Bonding Company of Baltimore. Incorporated 1894.]

D. C. MACKEY,
Assistant Secretary.

Statement of American Bonding Company of Baltimore at the Close of Business, December 31st, 1902.

Capital paid in	$1,000,000.00
Stockholders' liability	1,000,000.00
Reserve for reinsurance	294,888.76
Surplus and undivided profits	332,450.58
Total	$2,627,339.34

Assets.		Liabilities.		
Stocks and bonds (market value)	$1,446,626.00	Capital stock		$1,000,000.00
Outstanding premiums, less commissions	85,528.35	Collateral and special deposits and bills payable		456,322.03
Accounts receivable, secured	155,363.18	Due for re-insurance		1,083.20
Interest accrued	15,851.70	Special reserve for reported losses, proofs not filed		70,885.70
Real estate	69,569.26	Legal reserve	$294,888.76	
Furniture and fixtures	1.00	Surplus and undivided profits	332,450.58	
Loans, (mortgage, time and call)	235,736.80			627,339.34
Cash in offices and depositories	146,953.98			
	$2,155,630.27			$2,155,630.27

STATE OF NEW YORK, *City and County of New York,* } *ss:*

I, Howard Abrahams, vice-president of the American Bonding Company of Baltimore, do hereby certify that the foregoing is a true statement of the assets and liabilities of the said company at the close of business, December 31st, 1902.

In testimony whereof I hereunto set my hand and affix the seal of the company this 18th day of July, 1903.

[Seal of American Bonding Company of Baltimore. Incorporated 1894.]

HOWARD ABRAHAMS.

Subscribed and sworn to before me this 18th day of July, 1903.

[Seal of Hulbert Ten Eyck Beardsley, Notary Public, New York.]

HULBERT T. E. BEARDSLEY,
Notary Public, New York Co.

161 Approved by—

ALTON B. PARKER,
Chief Judge of the Court of Appeals of the State of New York.

162 [Endorsed:] U. S. Supreme Court. Henry Muhlker, plaintiff in error, against The N. Y. & Harlem R. R. Co., *et al.*, defendants in error. Undertaking to prosecute writ of error.

Bushby & Berkeley, attorneys for plaintiff in error, office and post office address, 220 Broadway, borough of Manhattan, New York city. Service of a copy of the within undertaking with notice of approval is hereby admitted. Dated New York, July 27, 1903. Ira A. Place, attorney and solicitor for defendants in error, The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company.

163 *Opinion of Court of Appeals, State of New York.*

In the Court of Appeals.

HENRY MUHLKER, Respondent and Appellant,
vs.
NEW YORK & HARLEM R. R. Co. and NEW YORK CENTRAL & Hudson River R. R. Co., Appellants and Respondents.

(Decided February 24, 1903.)

L. M. Berkeley and James C. Bushby for plaintiff.
Ira A. Place for defendants.

PARKER, *Ch. J.:*

The facts of this case present the same question that was before this court in the Lewis case (162 N. Y., 202) and the Fries case (169 N. Y., 270) and that is, whether defendant is liable for any damages that may have been sustained by plaintiff by reason of the interference with his easements of light, air and access by the erection of the viaduct upon which its trains are now being run.

Defendant was incorporated in 1831, and in 1832 it took from one Poillon a deed to a strip of land 24 feet wide in the center of what is now known as Fourth avenue, in the city of New York, along which the premises belonging to the plaintiff are situated. Subsequently double tracks were laid thereon and trains operated, and this continued until after 1872. In that year an act was passed (ch. 702, Laws of 1872) under which the tracks were increased to four and were laid in a subway or cut bounded on both sides by masonry walls which rose to a height of three feet above the
164 surface of the avenue. As soon as the work was completed the tracks were used for railroad purposes and so continued until the State compelled the road to abandon their use and to operate its cars upon the viaduct which was constructed by the State pursuant to ch. 339 Laws of 1892.

Without further reference to the history of the road in that avenue it may be said that prior to the time when the operation of its trains was transferred from the subway to the viaduct it had acquired the right as against the abutting owners to maintain its railroad and run its train along and over Fourth avenue. (Fries case, *supra.*)

In 1890 Congress passed an act directing the Secretary of War to cause the bridges over the Harlem river to be replaced by other bridges which should be at least 24 feet above the high water of the spring tides. (U. S. Statutes at Large, vol. 26, p. 437.) As defendant's road crossed one of these bridges compliance with the provisions of this act made necessary a change in the grade of defendant's railroad, and the act provided that such changes should be made as soon as the necessary legislation could be obtained to authorize a change in the grade of the approaches to the bridge.

About two years later the legislature passed the act already referred to by which it undertook to accomplish the result aimed at by Congress in such a manner as actually to improve the use of the street itself, a part of the scheme being to compel this defendant to operate its road upon a steel viaduct elevated above the ground, thus giving the public the use of the whole of the surface of the street, which before was impossible.

This improvement was made by the State for the benefit of the public, the expense of it, by the mandate of the State, being borne by the city and this defendant in equal proportions. What
165 was done by the State and the legal effect of its action upon the rights of this defendant cannot be better stated than it was by Judge Vann in the Lewis case (*supra*) and so I quote it:

"That structure was not erected by the defendants, but by the State, as appears from the facts already stated. South of 125th street it gave them no facilities which they did not have before. The stone structure of 1872 did away with grade crossings and gave them four tracks, and this is all they have now. The change of grade north of 125th street, in order to cross the Harlem river at the height required by the general government, has no bearing upon the change of grade south of that point. The defendants are liable for what they did but not for what the State did. (Atwater *vs.* Trustees of Vil. of Canandaigua, 124 N. Y., 602.) The State created a board of experts and required them to make the improvement for the benefit of the public, giving them absolute control with no right on the part of the defendants to let or hinder. The board made the plans and did the work, letting their own contracts, employing and discharging their own men, without supervision or interference by the companies, which did not and could not set the board in motion, for the want of power, if for no other reason. The change of grade in front of the plaintiff's premises was not only for a public purpose, but was wholly in the interest of the public and not for the benefit of the defendants who had no power to prevent it. They simply paid one-half of the expense by the command of the statute, and, hence, under compulsion of law. They are not liable for the acts of the Park Avenue board, which was not their agent, but a governmental agency of the State. (Benner *vs.* Atlantic Dredging Co., 134 N. Y. 156, and cases cited on page 162.)
166 Their offer in advance to obey the statute did not affect its compulsive force, for obedience was their duty. As was tersely said in a late case, the railroad company 'had no choice left

to it. The State intervened and directed that a work, which it had the power to require to be done, should be done, not by the railroad nor even by the city, but by an independent board in the creation of which the defendant had no voice, over whose selection of employees it had no control, with the discharge of whose functions it could not interfere and whose operations is was powerless to prevent.' * * * The statute 'authorized and directed' the defendants to operate their trains on the structure 'when completed.' Accordingly they laid their tracks, at first on the trestle work, which they used for a short time, and then on the steel viaduct, which they have used ever since. In thus using the work of the State they doubtless accepted it as their own, but they accepted it as a completed structure, and did not thereby become parties to the process of construction, Their acceptance did not reach back and adopt the previous acts of the State, but the effect was the same as if they had purchased it from the State on the day they commenced to use it."

Although at the time of the decision of the Lewis case we accepted as sound the proposition that, when defendant commenced to use the steel viaduct, it started a new trespass upon the rights of the abutting owners for which it could properly be held liable, subsequent reflection persuaded the majority of the court that this was error. The reasoning which seemed to command the latter conclusion was, briefly, that the State, setting about making improvements in Fourth avenue which were to benefit the general public, found defendant in possession of four tracks in the middle of the
167 avenue, with the right to operate its trains upon them, which it was enjoying. The State could not if it would—and probably would not if it could—deprive defendant of its right to operate its trains in the street. But it had the power in the public interest to compel it to run its trains upon a viaduct instead of in the subway. So the State builded the viaduct over the part of the street formerly occupied by the subway and compelled it to stop running its trains in the subway and to run them on the viaduct instead. The State had the power to do these things and all of them, and defendant, having the right to move its trains over the street, which could not be taken away from it, did not lose that right and become a trespasser because it obeyed the command of the statute, which it could not refuse to obey, to operate its trains upon the structure which the State had built.

The plaintiff was injured by the change, as appears from the findings. But who caused the injury? The defendant, which obeyed the command of the statute which it had not the right to resist, or the State, which had the power to make the changes which were made in the street and did make them and then compelled defendant to make use of them? The question admits of but one answer, and that is, it was the State.

When the question was again presented, therefore, as it was in the Fries case (*supra*), we attempted to cure the error which we concluded we had made in the Lewis case. The opinions in the Fries case

were written by Judge O'Brien and Judge Martin. In the course of Judge O'Brien's opinion it is said:

"I am unable to perceive any reason why the legislature had not the power to improve the avenue by removing the railroad from the cut to a viaduct, and if the change affected the rental or
168 fee value of the property of an abutting owner having no title to the street, it was but a consequence of the improvement, for which the railroad was not responsible. The law is well settled in this State that where the property of an abutting owner is damaged, or even his easements interfered with in consequence of the work of an improvement in a public street conducted under a lawful authority, he is without remedy or redress, even though no provision for compensation is made in the statute. Whatever detriment the improvement may be to the abutter in such cases is held to be *damnum absque injuria*."

Judge Martin states the principle as follows:

"It must also be admitted that all the acts of the defendants for which the plaintiff claims they are liable were performed under and in accordance with the direct and express mandate of that statute That there was no encroachment upon or actual interference with the plaintiff's premises, and that the improvement was made for the benefit of the public, and in a proper manner, are likewise practically conceded. Hence, the broad question presented is whether, in the absence of any statute providing for compensation, the defendants are liable for remote or consequential damages in having performed only such acts as were required by the express provisions of the statute upon works of a public nature, where there was neither negligence nor want of skill, and no direct invasion of any private property of the plaintiff. We think not. In every civilized community controlled by governmental or municipal laws or regulations, there are many cases where the individual must be subjected to remote or consequential damage or loss, to which he must submit without other compensation than the benefit he derives from the social compact."

169 The judgment was accordingly reversed. That decision was deliberately and carefully made, and reflected the view of a majority of the members of this court at that time, and still does.

The dissenting opinion cited, and correctly, the Reining case (128 N. Y., 157), as authority for the proposition that "while the public authorities may raise the grade of a street for a street use, or may authorize the construction of a surface railroad on the street, in either case without liability to the abutters, they cannot raise the grade of a street *for the exclusive use* of a railroad without compensating an abutter for the injury inflicted." But that proposition is not involved in this case. Here the State did not authorize a change in the street for the exclusive use of the railroad. The change was made for the public benefit as well as for that of the railroad, and for that reason the State compelled the city of New York to pay one-half of the expense of it.

The decisions in the elevated railroad cases are not in point. There no attempt was made by the State to improve the street for the benefit of the public. Instead, it granted to a corporation the right to make an additional use of the street, in the doing of which it took certain easements belonging to abutting owners, which it was compelled to compensate them for.

It is again urged on this appeal that the act under which these changes were made is unconstitutional, and hence that defendant need not have obeyed its commands. But that question was considered and passed upon by this court in the Fries case, every member of the court, whether voting with the majority or minority, agreeing that the act was constitutional. Judge O'Brien said, in discussing the constitutional question: "I think it would be
170 difficult, in view of the authorities cited, to state any ground upon which it can be questioned." And Judge Martin commenced his opinion by saying: "Although there is a divergence of opinion among the members of the court as to some of the legal questions involved in this case, yet all agree that the statute under which the acts complained of were performed was valid, and that the legislature did not transcend its powers in enacting it." And Judge Cullen said: "The statute is not unconstitutional and no decision to that effect is necessary to secure plaintiff's rights."

We still think, under the authority of Radcliff's Executors *vs.* Mayor, etc., of Brooklyn (4 N. Y., 195), and the other cases cited by Judge Martin in his opinion in the Fries case, that the State had the power to make this improvement, as it did, without compensation to the abutting owners. Undoubtedly the State had also the power to provide in the act for compensation to abutting owners, and to apportion the expense incurred in the acquisition of the easements destroyed upon the defendant and the city of New York, as it apportioned the expenses of building the viaduct and making the other changes in the street; and it still has the power to authorize ascertainment of the damages to the abutting owners through its court of claims and to provide for their payment, and it may well be that it would be equitable for it to do so. But that it possessed the power to improve the street, as it did, for the benefit of the public, in the manner that it did, compelling abutting owners to bear so much of the burden of the improvement as resulted from the partial destruction of their easements of air, light and access, we have no doubt. Indeed, if in the judgment of the legislature it had seemed wise and just to do so, it could have assessed a portion of the expense of the improvement upon the abutting owners
171 instead of placing it all upon the defendant and the city.

The judgment should be reversed and the complaint dismissed, without costs.

BARTLETT, *J.* (dissenting):

This is one of a large number of cases brought against the defendant railroad companies to recover damages for the erection of the steel viaduct in Park avenue, extending from near 106th street to

the Harlem river, and over which the defendants operate their railroad with some two hundred trains a day.

The plaintiff recovered three thousand dollars fee damages and fourteen hundred dollars rental damages from February 16th, 1897, to October 10th, 1900, which was the date of the trial. The former date, February 16th, 1897, is the day on which the defendant companies began running their trains. The judgment of the appellate division was entered on the 29th day of April, 1901.

The case of Fries against these defendants was not decided in this court until December 31st, 1901. (169 N. Y., 270.)

The plaintiff appealed from the judgment on the ground that they were limited in their recovery by an improper rule as to the measure of damages, the court holding that he was not entitled to recover damages prior to February 16th, 1897, the day the steel viaduct was completed.

The counsel for the defendants also appeals, contending that our decision in the Fries case is conclusive as to all questions presented in the case at bar, and nothing remains to be decided.

The counsel for the plaintiff attempts to distinguish these
172 cases as follows: (1) That in the Fries case there was a finding that the defendants had "acquired the right, without liability to the plaintiff, to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16th, 1897," and in the case at bar there is no such finding; (2) that Fourth or Park avenue, in front of the premises in suit, was a public street prior to the defendants' entry into the same. (The premises involved are situated at the northwesterly corner of Park avenue and 115th street, and the viaduct structure of iron and steel in front of these premises is about 59 feet wide, and consists of four tracks laid on a steel structure, having a mean elevation of about 31 feet above the surface of said avenue. Prior to the erection of this viaduct, the tracks in the subway were at the south line of the plaintiff's premises, about level with the surface of the avenue, and at the north line about five and one-half feet below it. This subway was completed and trains began to be operated in it in 1878); (3) that in the Fries case the act of 1892 was assumed to be constitutional, and in this case its constitutionality is controverted; (4) that the rule of *damnum absque injuria* has no application to this case.

The plaintiff contends that Fourth avenue was a public street at the time the Harlem Railroad Company, which is the lessor of the Central and Hudson, was organized.

Twenty-four feet of Fourth avenue, as it was then called, in front of the premises in question, were conveyed to the city July 24th, 1827, by Poillon.

In January, 1832 (the Harlem Railroad Company having been incorporated in 1831), Poillon conveyed to the Harlem Railroad
Company 24 feet in Fourth avenue, but at that time he had
173 nothing to convey; he also refers in that conveyance to, and sanctions the map of New York, filed by the commissioners in 1811 under the act of 1807.

So far as these premises are concerned, it would seem as if the only right the Harlem Railroad Company acquired in the street, if any, was a prescriptive one, that would be no broader than its actual occupation (Lewis case, 162 N. Y., 202).

It is true that Poillon's deed to the city was never recorded, but this was not essential in order — create a highway. (Driggs *vs.* Phillips, 103 N. Y. 77.) Furthermore, the Harlem Railroad Company could not be regarded as a purchaser in good faith and for a valuable consideration, and under the provisions of its charter and its agreement with the city, and the ordinance of the board of aldermen following the agreement, it would seem to have entered upon Fourth avenue under all the restrictions in these various documents contained, and was in no sense the exclusive owner of the fee of the street, getting title from a private grantor.

The charter of the company is found in the Laws of 1831. The agreement bears date January 9th, 1832, and the ordinance was passed by the board of aldermen on January 20th, 1832.

In less than twenty years after any of these dates the city began condemnation proceedings to widen Fourth avenue, which was then 100 feet wide, and it was proposed to add twenty feet on each side, which was condemned, and the 100 feet, representing the old street was marked "ceded." It does, however, appear in some of these litigations that a decree of condemnation went in form against the Harlem Railroad Company as to the portion of the street occupied by it, declaring a condemnation in consideration of one dollar. This report was confirmed sometime in the year 1850.

The changes in Fourth avenue, as it was then called, and
174 the railroad structure under the act of 1872, resulted in a new state of affairs as to the grade of the tracks, both on viaducts and in cuts, which was not completed until 1878. It, therefore, follows that the contention of the defendants, as to undisputed title in the avenue, in front of the plaintiff's premises, cannot be maintained.

The claim that the act of 1892 is unconstitutional cannot be sustained.

If it be true that the defendants have no legal right, by reason of grant or prescription, to erect this steel viaduct to the height of 31 feet in front of the premises in question, the effect of the act of 1892 is simply, as in the elevated railroad cases, to authorize the construction of this viaduct structure in the avenue, subject to the rights of abutting owners, to the extent that their easements of light, air and access have been invaded.

The mere fact that the act does not provide for compensation has no controlling effect. The legislative sanction to construct what would otherwise be a nuisance in a public street does not imply the power to take the easements of abutting owners, which are property, without compensation.

The fundamental error in the Fries case is the assumption that the doctrine of *damnum absque injuria* is applicable.

In the prevailing opinion in that case the learned judge said: "So

we have the case of a change of grade in a street, which necessitated a change in the location of the railroad tracks, all made under a valid statute, and that alone is said to constitute the alleged trespass."

If this statement was correct, it would be too clear for argument that the doctrine of *damnum absque injuria* would apply to this case.

The fact is that there was no change of the grade in Park
175 avenue. The title of chapter 339 of the Laws of 1892 reads: "An act to regulate, improve and enlarge Park avenue above 106th street in the city of New York, and providing for the passage of intersecting streets, under the railroad structure of the New York and Harlem Railroad Company, *and for the elevation of said railroad structure, and for changing the grade of said railroad*, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary *by reason of such change in structure and grade and increased elevation of bridge* and for other purposes."

It is profitable at this point to consider in detail the history of this act.

The Federal Government determined to raise the height of the bridge which was in use by the railroad companies. The State of New York, as in duty bound, passed this act in question to carry out the change which Congress had decided should take place.

This act in brief directed that the grade of the Harlem Railroad Company's track should be raised between 106th street and the Harlem river. This was done in order to accommodate it to the new bridge.

The mayor of the city of New York was authorized by section thirteen to appoint a board to be known as "The board of the Park Avenue improvement above 106th street," whose duty it was to execute contracts and superintend the construction of said improvement. Upon the completion of the work the counsel to the corporation of the city of New York was required by section sixteen to apply to the special term of the supreme court in the first department for the appointment of commissioners to determine the
176 area of assessment to raise money to pay for the bonds to be issued by the city in payment of its share of the work.

The act provided that the city of New York should pay one-half and the railroad company the other half of the cost of this work if it did not exceed a million five hundred thousand dollars; if it exceeded that amount the railroad company was to pay the entire excess.

As I understand the Fries case, the majority of the court held (1) that this was work of a public nature, and that the railroad company was not liable for injury to the easements of light, air and access unless there was a want of skill, or negligence, in the performance of the work; (2) that the principles of law relating to the change of grade of streets, when lawfully made, are applicable to

this situation, and that the doctrine involved in the elevated railroad cases has no application.

The act upon its face shows that the legislature did not consider it was providing for a public work for which the State was to be liable. The provision that a small portion of the city and the railroad company shall pay between them the cost of this work, and if it exceeded a certain sum the excess should be paid by the railroad company, is conclusive evidence that it does not contemplate a public work inflicting damages which can only be recovered under a special provision of law, or by showing negligence or want of skill in the performance thereof.

The raising of the bridge by act of Congress contemplated, it is reasonable to suppose, the making of the navigable tide waters of the Harlem river accessible to vessels of greater draught, with taller masts and smokestacks, thereby benefiting the city of New York and incidentally the great railroad corporations using this bridge, they being interested in the growing prosperity of the municipality and the improved facilities for entering the city of New York by land and water.

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These considerations and the details of the act already referred to, lead me to the conclusion that this work was not of the character assumed by the prevailing opinions in the Fries case. If it were of that character, then it was unjust, and even unconstitutional for the legislature to have imposed any portion of the costs of this work upon the railroad corporations and a small section of the city of New York included in an area of assessment to be fixed by commissioners.

We thus have a situation presented similar to that in the elevated railroad cases, to wit: An elevated structure in the center of a public street, extending in places to the height of thirty-one feet, for the express purpose of elevating the railroad tracks so as to connect with the new bridge.

In my opinion to hold that the act of 1892 provides for raising the grade of Park avenue, is judicial legislation, and introduced in the Fries case a fact not disclosed by the act itself, and not discussed at our bar when that case was argued.

These cases present a situation covered by the case of Reinning *vs.* N. Y., L. & W. Ry. Co. (128 N. Y., 157). While the case cited does not present facts similar to the one at bar, yet the principle involved is precisely the same.

It was there held that a municipality could not, under the guise of exercising the power to alter the grade of a street, appropriate a part of the street practically to the exclusive use of a railroad company and cut off abutting owners without compensation from using any part of it in the accustomed way. In other words, this was a limitation of the power of the common council conferred upon it by the legislature in the city charter of Buffalo.

Judge Andrews, in applying the law of elevated railroad cases, as laid down in the Story case, said: "It is no longer open to debate in this State that owners of lots abutting on a

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street, the fee of which is in the municipality for street uses, although they have no title to the soil, are nevertheless entitled to the benefit of the street in front of their premises for access and other purposes, of which they cannot be deprived except upon compensation."

It was expressly held in the case cited that the erection of an embankment in the street, and running parallel therewith, and occupied by a railroad company, was not a change of the grade of the street.

That the legitimate change of the grade of a street, to the damage of abutting lot owners, is damage without injury, is the settled law of this State, but it involves a principle that has been condemned in many jurisdictions, and the hardship of which has been cured in some of the States by constitutional amendment providing for the payment of such damages. It is a doctrine which ought not to be extended.

I am of opinion that the law controlling the elevated railroad cases is applicable here and that the decision in the Fries case reversed a rule of property law under which millions of dollars have been paid out by the elevated railroad companies to abutting owners who had no title to the street.

The New York and Harlem Railroad Company is not vested with any title in Park avenue that permits it as the owner of real estate to erect this elevated structure without regard to the injury it may work upon the easements of light, air and access enjoyed by abutting owners. They must settle for damages caused by so much of the structure as exceeds established user.

In several of the cases now before us it appears that the
179 city received a conveyance of the fee before the railroad company took the deeds from grantors, who practically had nothing to convey. In another case there is a title under condemnation proceedings against an infant in 1830, presumably securing to the railroad company the right to operate its road on the strip twenty-four feet wide.

The details of the railroads' title were carefully and elaborately examined in the Lewis case (*supra*).

I am of opinion that this invasion of the easements of abutting owners has vested in them a valid claim against the railroad company, and if this court adheres to its decision to the contrary, on the ground that it was a public work ordered by the State, then these damages are a valid claim against the State.

I have no disposition to urge, unduly, the reconsideration of the principles of law laid down in the Fries case. I understand that the court desires a full and free discussion of this entire question. I shall be content if a result is reached in these cases adverse to the plaintiffs, so long as I place myself on record as dissenting, on the ground that it practically reverses the Lewis case and adopts a principle that is at war with the long line of decisions in the elevated railroad cases and the established law of the State.

If this judgment is reversed it should be without costs.

I vote for affirmance.

CULLEN, *J.* (dissenting):

I concur in the opinion of Judge Bartlett and dissent from the decision about to be made. I feel that I am not precluded from taking this course by the previous decisions of this court, for against the authority of the Fries case may be fairly set off that of
180 the Lewis case. But the court having on this appeal re-examined the whole question involved in both the cases cited, and determined that the plaintiff is not entitled to compensation for the injuries to his property complained of, I must hereafter subordinate my judgment to that of the majority, and shall regard subsequent discussion of the question as foreclosed by the action of the court in the present case.

Haight, Martin and Werner, J. J., concur with Parker, Ch. J.; Bartlett, J., reads dissenting opinion, and Cullen, J., concurs in memorandum; Gray, J., not sitting.

Judgment reversed, &c.

181 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of New York, possessors of the return and record in the action in which Henry Muhlker is plaintiff and The New York & Harlem Railroad Company and The New York Central & Hudson River Railroad Company are defendants, Greeting;

Because in the record and proceedings, as also in the rendition of the judgment of a plea in the court of appeals in the State of New York, wherein final judgment upon return from the supreme court of the State of New York was rendered February 25, 1903, that being the highest court of law and equity of the said State in which a decision could be had in the suit or action between Henry Muhlker, plaintiff below and plaintiff in error, and The New York & Harlem Railroad Company and The New York Central & Hudson River Railroad Company, defendants below and defendants in error, and which has been remitted to said supreme court for execution and is now before you or some of you in said court; wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, a manifest error hath happened to the great damage of the said Henry Muhlker, as by his complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given,
182 that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concern-

ing the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the said Supreme Court, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 27" day of July, in the year of our Lord one thousand nine hundred and three.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS,
Clerk of the United States Circuit Court
for the Southern District of New York.

Allowed by

ALTON B. PARKER,
Chief Judge of the Court of Appeals,
of the State of New York.

183 [Endorsed:] U. S. Supreme Court. Henry Muhlker, plaintiff in error against The N. Y. & Harlem R. R. Co. *et al.*, defendants in error. Writ of error. Bushby & Berkeley, attorneys for plaintiff in error. Office and post office address, 220 Broadway, borough of Manhattan, New York city. Rec'd July 29th, 1903. Filed Jul- 29, 1903. Service of a copy of the within writ of error with notice of allowance is hereby admitted. Dated New York, July 27, 1903. Ira A. Place, attorney and solicitor for defendants in error, The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company.

Endorsed on cover: File No. 19038. New York supreme court. Term No. 387. Henry Muhlker, plaintiff in error, *vs.* The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company. Filed August 1st, 1903.

FILE COPY.

NEW YORK PARK AVENUE VIADUCT CASES.

Supreme Court of the United States,

OCTOBER TERM, 1903.

FILED
OCT 5 1903
JAMES H. McKENNEY,
Clerk.

HENRY MUHLKER,
Original Plaintiff and Plaintiff in Error,

against

THE NEW YORK AND HARLEM RAILROAD COMPANY AND THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Original Defendants and Defendants in Error.

No. 384,
Error to the Supreme Court of New York.

MOTION TO ADVANCE FOR HEARING UNDER RULE 26.

JAMES C. BUSHBY and
L. M. BERKELEY,
Attorneys for Plaintiff in Error,
220 Broadway, New York City.

HENRY G. ATWATER,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States,

OCTOBER TERM, 1903.

HENRY MUHLKER,
Original Plaintiff and Plaintiff in Error,

AGAINST

THE NEW YORK AND HARLEM RAILROAD COMPANY AND THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Original Defendants and Defendants in Error.

No.
Error to the Supreme Court of New York.

NOTICE OF MOTION TO ADVANCE FOR HEARING UNDER RULE 26.

SIR:

Notice is hereby given that the annexed motion to advance for hearing the above-entitled case which is numbered 387 on the docket of this court for the October Term, 1903, under section 7 of rule 26, will be presented upon the record in said case to the Supreme Court of the United States, at the Capitol in the City of Washington, D. C., on Monday, the 12th day of October, 1903, at the coming in of the Court on that day, or as soon thereafter as counsel can be heard.

WASHINGTON, D. C., October 2nd, 1903.

JAMES C. BUSHBY, and
L. M. BERKELEY,
Attorneys for Plaintiff in Error,
220 Broadway,
New York City.
HENRY G. ATWATER,
ALFRED B. CRUIKSHANK,
of Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

HENRY MUHLKER, *Original Plaintiff & Plaintiff in Error,* AGAINST THE NEW YORK AND HARLEM RAILROAD COMPANY and THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, *Original Defendants & Defendants in Error.*	No. Error to the Supreme Court of New York.

MOTION TO ADVANCE FOR HEARING UNDER RULE 26.

Upon the record in the above-entitled case, the original plaintiff and plaintiff-in-error moves that said case be advanced for hearing upon the docket of the Court, and respectfully submits the following brief statement of the matter involved with the reasons for the application:

STATEMENT OF THE MATTER INVOLVED.

This action was brought January 7, 1897, in the Supreme Court in the County and State of New York by Henry Muhlker, original plaintiff and plaintiff-in-error, to recover damages for injury to plaintiff's property by reason of the construction and operation by defendant railroad companies of an elevated or viaduct railroad upon what is known as Fourth or Park Avenue in Manhattan, in the City of New York. Plaintiff was the

owner of a lot on which was erected a tenement house fronting on said avenue. Prior to 1892 the defendants' railroad tracks had been laid in a subway or trench on said Park Avenue in front of plaintiff's premises, and for a long distance up and down the avenue. Between 1892 and 1897 such changes were made that the said railroad was elevated and placed upon a steel viaduct over the former road-bed in a manner substantially like the other elevated railroads in the City of New York. Prior to that time it had been already decided in actions brought against the companies operating the original elevated railway system in New York City, that property owners were entitled to recover compensation for damages caused by the construction and operation of elevated railroads in the streets of New York, including damages caused by the appropriation by such railroads of the easements of light, air and access appurtenant to said properties, and this although the erection of said elevated railroads had received municipal and legislative sanction, it being held in those actions that there was no authority in the municipality or legislature to take private property of this character without due process of law and compensation therefor.

The present action was tried in the City of New York in equity before a justice and without a jury, and plaintiff recovered the sum of $3,000 damages to the fee and $1,400 rental damages, and the judgment upon appeal by the defendants was affirmed by the Appellate Division of the Supreme Court of the State of New York. But upon appeal by defendants to the Court of Appeals, which is the Court of last resort in the State of New York, the judgment was reversed and the record returned to the Supreme Court with directions to dismiss the complaint.

The principal ground of the decision of the New York Court of Appeals and the determination which it is desired to present to this Court for review is, that the railroad structure having been erected by legislative mandate and State supervision, the defendants were not liable for damages caused to plaintiff's property either by

the construction or the present maintenance and operation thereof by defendants in error.

In making this decision the Court of Appeals of the State of New York decided in favor of the validity of Chapter 339 of the Laws of 1892 of the State of New York and amendments thereof and of the authority exercised thereunder by defendants to take the plaintiff's property without compensation and without due process of law, and further decided against the claims of the plaintiff and plaintiff in error that said statutes and the authority exercised thereunder were repugnant to the Constitution of the United States. The following Federal questions were therefore involved herein:

1. Whether the property rights and easements of the plaintiff and plaintiff in error have been taken without due process of law, and without compensation in violation of Section 1, Article 14 of the Amendments to the Constitution of the United States.

2. Whether the obligation of certain contracts under which the plaintiff's said property rights and easements were created and existed have been impaired by the taking of said property rights and easements in violation of Section 10 of Article 1 of the Constitution of the United States.

Both these questions are fairly and clearly raised in these cases as appears not only by the record of the proceedings in the said Court, but also by the final decision of the Court of Appeals which recites that said questions were before it and were decided as aforesaid.

Reasons for the Application to Advance the Case.

I.

The matter involved is one of general public interest in the City of New York, and there are special and peculiar circumstances why this cause should be advanced. There are about two hundred pieces of proj-

erty fronting on Park Avenue which have suffered damage similar to that of plaintiff's property herein, and about one hundred and sixty actions including claims amounting to over $2,000,000 have been brought and are now pending in the Supreme Court, County and State of New York, by property owners similarly situated to plaintiff, to recover such damages, all founded upon practically the same state of facts as set forth in the complaint in this action, and all defended upon practically the same grounds, namely, that the railroad companies, defendants and defendants in error herein, erected the railroad structure in question under an express mandate of the legislature. In some of these cases other questions are involved, as for example, questions of title or claims of express or implied consent by plaintiffs or their ancestors to the erection of the structure, but in all the cases the main question is as to the validity and effect of Chapter 339 of the Laws of 1892 of New York aforesaid. In some instances it is claimed and the recoveries show that properties have decreased twenty-five per cent. in their value in consequence of the erection and operation of the elevated railroad structure in question.

There has been considerable doubt, conflict and perplexity in the Courts of New York in dealing with these questions. At first the Court of Appeals sustained the claims of the property owners and affirmed a judgment in favor of one Lewis obtained against defendants in error herein, on grounds precisely similar to the plaintiff's claim in this action (*Lewis* v. *N. Y. & Harlem Ry. Co.*, 162 N. Y., 202, decided Feb. 27, 1900). Subsequently, and in February, 1902, the decision of the Lewis case was overruled in the Court of Appeals, in the present case of *Muhlker* v. *N. Y. & Harlem Railway Co.*, 173 N. Y., 549, and in the *Kierns case*, 173 N. Y. 642. Two judges of the Court of Appeals dissented in the present case from the prevailing opinion of the Court. Another judge of that Court writing in another similar case, announced his dissatisfaction with the decision. The dissenting judges however stated that

hereafter they would vote with the majority to dismiss all these cases under the rule of *stare decisis* (173 N. Y., 643), and accordingly in the Siegel and Birrell cases also brought against the defendants in error, they have recently dismissed complaints without opinion (173 N. Y., 644).

II.

The present situation in the Courts of New York is this. There are about one hundred and sixty actions pending for the recovery of damages in cases similar to this action. The Court of Appeals has dismissed the complaints in six of these actions. This is the first in which a writ of error to this Court has been taken, but applications for such writs of error are about to be made in the other five cases in which dismissals were obtained. In five other cases where judgments were obtained by the property owners, the Appellate Division of the Supreme Court has allowed new trials in order that the constitutional questions here presented may be formally placed upon the record in the Trial Court in order to insure a review thereof by the Supreme Court of the United States.

In fourteen other cases where trials have been had, said constitutional questions were specifically raised by the plaintiffs and property owners, and decision upon those specific grounds rendered in their favor by the Trial Court in New York County, in each case, and all such cases are also on appeal to the Appellate Division of said Court.

In twelve other similar cases which have been tried, decision has been withheld by the Court of first instance, awaiting the result of the efforts now being made to obtain a hearing in this Court. There are about one hundred and thirty other similar cases on the calendar of the New York Supreme Court awaiting trial at the present time, in one of which a stay has been granted by the New York Supreme Court pending proceedings in this Court, and in most of the others by agreement between counsel, proceedings have also been stayed awaiting action of this tribunal in the present case.

III.

The decision of this case by this Court, and the determination of the Federal questions involved will save the one hundred and sixty persons interested as plaintiffs in these actions, and their counsel, and the witnesses, and the justices of the courts in New York an enormous amount of time, trouble, labor and expense. The New York Court of last resort has spoken its last word on the main question. It is conceded that that main question involves the application of the Federal Constitution, and all the above cases must sooner or later come to the Supreme Court of the United States for determination.

Although the questions we presented to this tribunal are merely questions of law and are the same in each one of these cases, yet the trials in the first instance require a different preparation and the presentation of different facts in each case, according to the character of the property, and the title and history thereof. Among other extraordinary items of expense attending trial in each of these cases is the testimony of real estate experts, of whom it is usual to call two on each side in these cases. If each one of these one hundred and sixty cases is required to go to trial, it will involve an expense to the parties concerned for counsel, experts and printing of at least $1,000 on an average in each case before it will have reached this Court.

In many of the said pending cases the attorneys and counsel making this application are interested and we have reason to know that most, if not all of said cases, will be presented to this Court if necessary to obtain a decision on the constitutional questions pending.

IV.

The decision of this Court will be of enormous value to the State Courts of New York in the trial of these one hundred and thirty causes now pending therein, and on the re-trial of others where re-trials may be ordered, if in any case such re-trials are to be had. The State

Courts of New York have differed not only on the main question as to whether property owners were entitled to any compensation in this matter, but also on another important question, namely, whether compensation should be awarded merely for the damages accruing after construction of the viaduct in question, or whether property owners were entitled to compensation for damages caused by the erection of the structure. The State Supreme Court in some instances held that property owners might recover for all damages accruing, as well from the construction of the road as from its operation. The Court of Appeals at first held in the *Lewis* case that such damages were recoverable as accrued from the operation of the road, because that operation was carried on by defendants for their own benefit, but not such as accrued during the period of construction which lasted several years, because such construction was the result of a positive mandate of the legislature of New York, and was conducted under the supervision of the legislative commission.

It is apparent, therefore, that a speedy hearing and determination of the questions involved in this case by this Court will be of great value to the New York Courts; that it will save a great number of people much anxiety and expense, and that it will obviate the necessity of trials, appeals and re-trials of numerous cases, and that in fact the circumstances under which this motion is made were special and peculiar and entitle this case to be advanced upon the calendar.

V.

The City of New York has begun a proceeding to determine whether or not an assessment should be imposed upon abutting property owners to pay about $800,000 towards the expense of constructing said elevated railroad structure. Commissioners, appointed by the New York Supreme Court, are now taking testimony, and the officials of said city, as well as the entire population thereof, are interested in the determination of the questions presented in this case.

VI.

The plaintiff in error therefore prays that this case may be advanced for argument to as early a date as may be convenient for the Court.

Notice of this motion has been served on Ira A. Place, Esq., attorney for the defendants in error.

New York City, October 2d, 1903.

JAMES C. BUSHBY & L. M. BERKELEY,
Attorneys for Plaintiff in Error.

HENRY G. ATWATER,
ALFRED B. CRUIKSHANK,
Of Counsel for Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES.

HENRY MUHLKER,
Original Plaintiff,
and
Plaintiff in Error,

against

THE NEW YORK AND HARLEM RAILROAD COMPANY, AND THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Original Defendants,
and
Defendants in Error.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

This is a writ of error to the Supreme Court of the State of New York, to review a judgment entered upon a decision of the Court of Appeals, which had reversed a judgment in the plaintiff's favor, and dismissed his complaint.

The federal question raised below and here is the constitutionality of an act of the New York legislature, passed April 19, 1892 (Ch. 339), which authorized the building and operation of an elevated railroad on Fourth or Park Avenue, in the City of New York, without compensation to abutting owners.

In the City of New York there is a railroad running from the Grand Central Station, at 42nd Street, northward along Fourth Avenue to the city limits, and beyond. This railroad is owned by the defendant the New York and Harlem Railroad Co., and is operated by the defendant the New York Central and Hudson River Railroad Co. under a lease from the first-named corporation (Record, original page 23). This railroad crosses the Harlem River, at the northern end of Manhattan Island (about 135th Street), on a bridge.

In 1890 Congress enacted a statute (the River and Harbor Act), in which there was a provision directing the Secretary of War to cause the bridges over the Harlem River to be replaced, at the expense of the owners, by other bridges, which should be at least 24 feet above the high water of spring tides (U. S. Stats. at Large, vol. 26, p. 437). The full text of this provision is printed in Appendix I. (p. 51) of this brief. The material portion is as follows: "The Secretary of War is directed to cause the low bridges now crossing said Harlem River to be replaced by other bridges at the expense of the owners thereof as soon as the necessary legislation, if any such legislation be necessary, shall have enabled the change in grade to the approaches of said bridges, thus required, to be made, the owners of said bridges being allowed a reasonable time in which to complete the work necessary for said approaches. Said bridges shall leave a clear space, between the under sides thereof and the high water of spring tides, of twenty-four feet, and shall be provided with draw-spans and draws of the width and length to be determined by the Secretary of War, and shall in all respects comply with this law and conform to the requirements of the Secretary of War."

The passage of the above act required a change

in the grade of the defendants' railroad in order to meet the grade of the new bridge over the Harlem River. The act provided, as appears above, that the change should be made as soon as the necessary legislation could be obtained to authorize a change in the approaches to the bridge.

The necessary legislation was supplied by the New York legislature in a statute passed in 1892 (Laws 1892, Ch. 339). The constitutionality of this statute is the sole question which the plaintiff in error presents to this court for decision. The full text of the statute is printed in Appendix II. (p. 52) of this brief. The legislature provided in this statute for a much more extensive change in the defendants' railroad than was necessary merely to cross the new bridge. For the purposes of the bridge, a change in grade, commencing at 129th Street, and running northward, would have sufficed.

Taylor *v.* N. Y. & Harlem R. Co., 27 App. Div. 190, 199-200.

But the act (§ 1) directed that the change in grade should commence at about 106th Street, and it prescribed minutely just how high the new grade should be. Prior to this time the railroad, going northward from 106th Street, ran on a stone viaduct, which gradually descended until it coincided with the surface of the ground at 115th Street (§ 2). North of this point it ran in a depressed cut or excavation along the centre of Fourth Avenue to the Harlem River (§ 3). The act (§ 4) directed that from 112th Street northward the tracks of the defendants should be elevated upon a "viaduct structure of iron or steel," which should be at a clear height of not less than 14 feet above the surface of the pavement. The act also provided (§ 13) for the appointment of a pub-

lic board, consisting of five members, who were "to execute, direct, and superintend" the work.

This board was appointed, and did its work, and in 1897 the defendants' trains began to be operated on the new viaduct (Record, p. 24).

The plaintiff is the owner of a five-story brick building at the northwest corner of Fourth Avenue and 115th Street, having a frontage of about 77 feet on the avenue (Record, p. 22). He viewed the erection of the above-mentioned viaduct with much dismay, for the citizens of New York are thoroughly acquainted with elevated railroads and with their effects upon adjoining properties. Prior to 1892, the railroad in front of the plaintiff's property ran in the old cut or excavation already mentioned, which, commencing at the south line of the plaintiff's premises, attained at the north line to a depth of 5½ feet below the surface of the avenue (Record, p. 23). This cut was bordered by masonry walls about 3 feet in height, so that trains running in the old cut were hidden to the depth of 3 feet at the south line, and 8½ feet at the north line, of the plaintiff's lot. The trains were thus largely out of sight and hearing, and the noise was largely deadened by the sides of the cut and by the masonry walls. The vacuum left behind the passing trains caused a draught of air into the cut, whereby the smoke, vapors, cinders, and dust from the locomotives were, to a certain extent, drawn back into the cut itself. The privacy of the plaintiff's apartments was not invaded; the view of and from his premises was not obstructed; there was no vibration of the houses resulting from passing trains; and his light and air and other easements were not seriously affected. The witnesses all agreed that this situation, while not altogether ideal for the abutting owners, was at least tolerable (Record, pp. 38, 65).

But the changes made pursuant to the act of 1892, have resulted in an entirely different situation. The railroad of the defendants, consisting of four tracks, is now operated upon a lofty metallic viaduct, supported by three rows of columns extending along the avenue. Six of these columns are directly in front of the plaintiff's premises. The height of the viaduct is 31 feet, and the width is 59 feet. The roadbed of the viaduct is solid, and rests upon huge solid girders extending along the avenue from column to column, the height or vertical dimension of these girders being 7 feet 4 inches (Record, p. 24). Every day about 500 trains, some of which are 18 cars in length, are run over this viaduct at a speed which sometimes reaches 25 miles per hour (Record, pp. 79, 80).

These conditions are unsurpassed for the production of *noise*. As descriptive of the phenomenon, the word noise seems tame and inadequate. The metallic viaduct constitutes a resonator of the very first order. On this resounding and vibrating roadbed the trains thunder by, day and night, at intervals of less than three minutes. You hear first a distant rumble, which increases in a steady crescendo till it becomes a deafening roar that cannot be matched outside of pandemonium. This noise needs to be heard to be appreciated. Verbal descriptions are pale and colorless (Record, pp. 41, 60, 65). One truthful, though ungrammatical, witness, a tenant of the building, said (Record, p. 44): "The noise is something so that you cannot stand it hardly. You cannot hear a word said in my place when a train is going by and for some time before it reaches there, and if you are talking to anybody, you have got to stop and wait until the train goes by." It is almost needless to add that this noise, besides interrupting conversation (Record, pp. 37, 41, 44, 60), prevents and disturbs sleep (Record, pp. 37, 39).

The locomotives, which pass just above the fourth story windows of the plaintiff's premises (Record, p. 65), belch forth smoke, steam, noxious fumes, dust, cinders, and dirt (Record, pp. 37, 39, 41, 44, 45, 60, 65, 81). These penetrate into the plaintiff's building. A tenant of the building said (Record, p. 41): "Everything in the house gets all black flecked if we leave them out any length of time. Even the bedding is all covered with little black flecks. On Saturday last we had some things out on the fire-escape, some celery, and the black flecks was ground into the celery." The cinders vary in size from minute specks up to large peas. From the fact that they come from the blast furnace of express locomotives, it may easily be inferred that these cinders are sometimes hot.

As already said, the viaduct is 59 feet wide, the roadbed is solid (Record, p. 24), and the top of the structure is just above the level of the plaintiff's fourth-story windows (Record, p. 65). Naturally, the structure itself and the passing trains obscure the plaintiff's light (Record, pp. 37, 60). The steam emitted by the engines reflects the light through the windows in flashes (Record, p. 65). This phenomenon is very familiar to the occupants of buildings along the line of the elevated railroads in New York City, and is as annoying as it is common.

The privacy of the plaintiff's rooms looking on Fourth Avenue "has been entirely destroyed unless you close the window and cover it up with a heavy shutter" (Record, p. 65). This loss of privacy causes complaints among the tenants (Record, p. 38).

The view of and from the abutting premises is destroyed, and the circulation of air thereto is impaired.

The operation of the trains causes vibration in the neighboring dwellings (Record, pp. 38, 60, 65).

After a rain, the structure drips for hours, and these drippings, after percolating through the oil and refuse of the roadbed, are injurious to the clothing of persons in the avenue (Record, p. 65).

The above effects of the operation of the viaduct prevent the abutting premises from being rented (Record, p. 37), cause reductions in rent (Record, pp. 40, 42), and drive away tenants (Record, p. 43).

To a property owner who is under the heavy and continuous drain of taxes and interest on mortgages, the erection of a railroad viaduct which drives his tenants away, is an event which spells ruin. The plaintiff, confronted with this situation, not unnaturally sought a legal remedy, and he brought this action to recover his damages for the past trespasses, and to obtain an injunction against the continuance of them in the future. The plaintiff supposed, and all the rest of the world supposed with him, that in the State of New York the law on this subject was absolutely settled. In the elevated railroad cases, numbering tens of thousands, the courts of New York had held that the construction and operation of an elevated railroad in a public street was a trespass upon the rights of the abutting owners, entitling them to relief. The plaintiff saw this elevated railroad in front of his windows, and he was unable to understand why the above rules of law did not apply to his case.

The first results were encouraging. Before the plaintiff's case was tried, an action brought by one of his fellow-plaintiffs, who owned property not half a block away, had come to trial, had resulted in a judgment in favor of the plaintiff, and

this judgment had been unanimously affirmed by the Court of Appeals.

Lewis *v.* N. Y. & Harlem R. Co., 162 N. Y. 202.

This decision is printed in Appendix IV. (p. 76) of this brief.

By this decision it was supposed that all possible doubt as to the defendant's liability was removed. Accordingly, the plaintiff prosecuted his action to trial. The only controverted question of fact at the trial was the amount of the plaintiff's damages. The court determined that these damages were very substantial, and gave a judgment for the plaintiff in the usual form awarded in elevated railroad actions, namely, for $1,984.23, as rental damages and costs, and for a conditional injunction, to be avoided by the payment of $3,000 fee damages (Record, p. 30). The value of the plaintiff's property being $29,750 (Record, p. 88), and there being a mortgage of $25,000 upon it (Record, p. 63), the plaintiff's equity ($4,750) is less than the damages found by the court. In other words, the judgment established that the plaintiff's entire interest in the property had been wiped out. This judgment was affirmed by the Appellate Division (Record, p. 127), and by this affirmance all controversy over the *amount* of the plaintiff's damages was set at rest; for under the constitution of New York the jurisdiction of the Court of Appeals in civil cases is limited to the review of questions of law.

N. Y. Const., Art. 6, § 9.
N. Y. Code Civ. Pro., § 191, subd. 3.

But before the plaintiff's case arrived in the Court of Appeals, that court, in the case of another abutting owner, had overruled its decision

made not two years before in the Lewis case, and, by a vote of four to three, had declared that the erection of the viaduct in question was a case of *damnum absque injuria*, which gave no right of action to any one.

Fries *v.* N. Y. & Harlem R. Co., 169 N. Y. 270.

This decision is printed in Appendix V. (p. 100) of this brief.

This decision was not made without a strong dissent, and one of the dissenting judges subsequently said in another case: "I regret the result reached * * * as amounting to the confiscation of property belonging to abutting owners and a gift thereof to railroad corporations."

Keirns *v.* N. Y. & Harlem R. Co., 173 N. Y. 643.

The opinion in which this was said, is printed in Appendix VI. (p. 120) of this brief.

When the case at bar arrived in the Court of Appeals, the plaintiff attempted to show that the Fries decision did not apply to him, because the corner-stone of the reasoning in that decision was that the act of 1892 was constitutional, whereas the plaintiff claimed, and had always claimed that as to him this act was wholly unconstitutional. The plaintiff then proceeded to argue the question of constitutionality. (See Record, p. 1c, and 173 N. Y. 550). The Court of Appeals, however, in deciding the case, treated the constitutional question somewhat cavalierly, merely saying that it had been considered and passed upon in the Fries case (Record, pp. 169-70). But in the Fries case this question was not raised by the record, and had not been argued. This is stated in so many words in the opinion of

O'BRIEN, J., who, speaking of the question of the constitutionality of the act, says (169 N. Y. 277): "It is clear that the plaintiff upon the present record is in no condition to raise any such question. He has not raised it in any form in any court, and it cannot be raised for him now, as this court has recently held (*Dodge* v. *Cornelius*, 168 N. Y. 242). The plaintiff has not only refused to raise any question concerning the validity of the statute in this or any other court, but has actually affirmed its validity by setting it out in his complaint and basing his action upon it."

It is somewhat bewildering to be told in the Muhlker case that the constitutional question "was considered and passed upon" in the Fries case, and yet to be told in the Fries case that this question was neither presented by the record nor argued by counsel. The Court of Appeals has always declared heretofore that it would not pass upon the constitutionality of a statute unless the question were unavoidable for the determination of the appeal.

Matter of Attorney-General, 155 N. Y. 442.
Demarest *v.* Mayor, 147 N. Y. 203.
Curtin *v.* Barton, 139 N. Y. 505, 510-11.

The Manner in Which the Constitutional Question Is Raised.

The question is clearly presented on the record. The plaintiff, it is true, made no reference to the statute in his complaint. His reason was that the statute was matter of defence, and to anticipate a defence would have been bad pleading. When the defendants set up the statute in their answer, the plaintiff was not required, and would not have

been permitted, to serve a reply, alleging that the statute was unconstitutional. Under the rules of pleading existing in New York, a reply is allowed only where the answer sets up a counterclaim (Code Civ. Pro., § 514), and there was no counterclaim here. In such a case, "an allegation of new matter in the answer, to which a reply is not required, or of new matter in a reply, is to be deemed controverted by the adverse party, by traverse or avoidance, as the case requires" (Code Civ. Pro., § 522). This is a statutory replication, and "secures to the plaintiff the benefit of every possible answer to the defence made by way of new matter, not constituting a counterclaim, as fully as though it were alleged in the most perfect manner."

Arthur *v.* Homestead Fire Ins. Co.,
78 N. Y. 462, 467.

Upon the trial, therefore, the plaintiff was at liberty to claim, and did claim, that the statute was a nullity. And it was so held by the trial court, for the judgment in favor of the plaintiff could not have been given, except upon the assumption that the defence in question was bad, and the statute void. The Appellate Division, in affirming the judgment, acted upon the same assumption. In the Court of Appeals the plaintiff again claimed that the statute was unconstitutional, and the judgment of that court shows that he did so (Record, p. 1c). It is well settled that a federal question is sufficiently presented, if it was raised, even for the first time, in the highest court of the state.

Rothschild *v.* Knight, 184 U. S. 334.

ASSIGNMENT OF ERRORS.

The error of which the plaintiff complains is

that the New York Court of Appeals held Chapter 339 of the New York Laws of 1892 to be constitutional, whereas the plaintiff contends that the said act is unconstitutional (1) in that it impairs the obligation of a contract, and (2) in that it directs the taking of property without due process of law.

FIRST POINT.

The plaintiff established three contracts within the contract clause of the federal constitution.

In discussing the question whether the obligation of a contract has been impaired, the plaintiff is called upon to show in the first place that there is a contract. On this point the plaintiff is under no embarrassment, for he is able to point out, not simply one contract, but three. We take these up in their order.

(1) The Grant from Benson to the City of New York.

The discussion of these contracts carries us back to the year 1825. We beg leave to emphasize this date, and to call particular attention to the fact that it was prior to the incorporation of either of the defendants. The New York and Harlem Railroad Co. was incorporated in 1831 by New York Laws 1831, Ch. 263 (Record, p. 81). Hence its rights, and those of its lessee, the other defendant, are not, and cannot be, superior to a contract made in 1825.

In 1825 the locality in question consisted of farm lands. A prominent landmark was a country road,

which appears on the maps of the period as the "Old Harlem Road." This road ran in a northeasterly direction, and crossed Fourth Avenue diagonally in front of the plaintiff's premises. (See description of Benson and Vredenburgh Map, pp. 51-2 of Record, and description of Map of Third Avenue Tract, pp. 101-2). The road is represented on the three maps constituting pp. 109, 111, and 113 of the Record (opposite pp. 63, 64, and 65, respectively, of the Transcript).

South of the "Old Harlem Road" the land was owned by one Benson. By a deed (Record, pp. 49-50), dated and recorded in 1825, Benson conveyed the portion of Fourth Avenue lying south of the "Old Harlem Road" to the City of New York. The strip thus conveyed was 100 feet wide, was bounded on the north by the centre line of the "Old Harlem Road," and extended southerly several hundred feet—considerably beyond the south line of the plaintiff's property. The conveyance was not a fee simple absolute, but was stated to be "in trust, nevertheless, that the same be appropriated and kept open as parts of public streets and avenues forever, in like manner as the other public streets and avenues in said city are and of right ought to be."

Benson's title to this strip of land is conceded on both sides, for the defendants also put in evidence a deed from Benson (Record, pp. 85-6). This deed assumed to convey to the New York and Harlem Railroad Co. a strip of land 24 feet wide in the centre of the avenue—being the same land which Benson had previously conveyed to the City of New York in 1825. The deed to the railroad company was dated in 1832 and recorded in 1835—which was ten years after the record of the aforesaid deed to the city. Under the recording act, therefore, the deed to the railroad company was

void. This elementary proposition will not be disputed, and we refer to the recording act merely to show that there was such a statute in force at the time.

N. Y. Rev. Laws of 1813, vol. 2, p. 406.
N. Y. Rev. Stats., vol. 1, p. 756, § 1.

Returning to the deed from Benson to the city, which is one of the contracts whose obligation, as we claim, has been impaired, it is well settled that the City of New York had due legal authority to take this deed.

Vail *v.* L. I. R. Co., 106 N. Y. 283, 287.
Hughes *v.* Bingham, 135 N Y. 347, 352.

The deed, therefore, was valid and binding, and being a grant or conveyance of land, it was an executed contract, and as such within the protection of the clause of the federal constitution which provides that no state shall pass any law impairing the obligation of contracts.

Fletcher *v.* Peck, 6 Cranch (U. S.) 87, 136-7.
Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 656-7.
McGee *v.* Mathis, 4 Wall. (U. S.) 143, 155.
Farrington *v.* Tennessee, 95 U. S. 679, 683.

We have thus produced a contract which the federal courts will recognize as within the protection of the constitution. The New York courts also have repeatedly declared that the proceedings through which the streets of New York City have

been opened, amount to a *contract* with the abutting owners. The statute under which these streets exist, is Chapter 86 of the Revised Laws of 1813. That act provides (vol. 2, p. 414) that when lands in New York City are acquired for public purposes, "the said Mayor, Aldermen, and Commonalty of the City of New York shall become and be seized in fee of all the said lands. * * * in trust, nevertheless, that the same be appropriated and kept open for, or as part of, a public street, avenue, square, or place forever, in like manner as the other public streets, avenues, squares, and places in the said city are, and of right ought to be."

In Lahr *v.* Met. El. R. Co., 104 N. Y. 268, 290, the court, construing the above clause of this act, said (of condemnation proceedings instituted thereunder): "Such proceedings created not only a valid trust in the city for the purposes expressed, which precluded it from authorizing any other use of the land acquired, than that expressly described in the statute (Cooley on Const. Limitations, 331), but also *constitute a contract between the public and the abutting owners severally,* by which the liabilities, rights, and interests of the respective parties are to be measured, and the enjoyment of their respective interests in the property (retained as well as acquired) regulated and determined."

The case just quoted was the second great case in the elevated railroad litigation. The same principle had been enunciated in the first case in that litigation, Story *v.* N. Y. El. R. Co., 90 N. Y. 122. In three places in the report of the Story case (pp. 160, 172, 177) it is laid down that the dedication of the streets of New York to a public use, amounts to a *contract,* which is written in the statute, and which is beyond the power of the legislature to impair.

The same rule was repeated in the third leading case involving the elevated railroads, Kane *v.* N. Y. El. R. Co., 125 N. Y. 164, 177.

Thus it is plain that under both the federal and the state decisions the deed under consideration is a *contract.* This deed, by its very terms, declares a trust. The statute under which it was given and accepted, also declares a trust. Thus Fourth Avenue, both by the dedication on the one side, and by the acceptance of the dedication on the other, was encumbered with a trust especially designed for the benefit of the abutting owners. These owners are beneficiaries under the trust, and entitled to enforce it in the courts. Thus in the Lahr case, 104 N. Y. 268, 291-2, it was said: "The covenant implied from the language of the statute, and the proceedings taken thereunder, was made with and intended for the benefit, among others, of abutting owners, and is a covenant which runs with the land and inures to the advantage of each successive grantee as he succeeds to the title."

The same thing was said in the Story case, 90 N. Y. 122, 176, and in the Kane case, 125 N. Y. 164, 183.

Thus the plaintiff, as a *cestui que trust* under this trust deed, is a party to it, and entitled to enforce it. That the owner of property abutting on a public street has the right to enforce the public purposes for which the street was dedicated, is the rule of this court, and, so far as we are aware, of all courts.

U. S. *v.* Illinois Cent. R. Co., 154 U. S. 225, 238.

(2) The Grant from Poillon to the City of New York.

North of the "Old Harlem Road" already men-

tioned, the farm land belonged to one Poillon. By a deed (Record, pp. 50-1) dated in 1827, but not recorded, Poillon conveyed the portion of Fourth Avenue lying north of the "Old Harlem Road" to the City of New York. The strip thus conveyed was bounded on the south by the "Old Harlem Road," and extended northerly several hundred feet—considerably beyond the north line of the plaintiff's property. This conveyance also was not absolute, but "in trust that the same be left open as public streets for the use and benefit of the inhabitants of the said city forever."

The right of the plaintiff to enforce the trust created by the Poillon deed is clear; for he derives his premises by a regular chain of title from Poillon himself (Record, pp. 52-6).

The situation with reference to the Poillon deed is exactly the same as in respect to the Benson deed, with one exception, namely, that the Poillon deed was never recorded. The question now arises whether this fact makes any difference.

Very clearly it does not. A record is not necessary to the creation of a highway.

Driggs *v.* Phillips, 103 N. Y. 77.

What *is* necessary, is a dedication and an acceptance. The deed itself was a dedication, and there is evidence that the dedication was accepted; for the deed was produced from the custody of the Comptroller of New York City (Record, p. 50), in whose office all such deeds of cession are kept; and, moreover, we find that a resolution passed by the municipal authorities in 1832 refers to the avenue as "ground owned by the common council" (Record, pp. 102-3). In Matter of Hunter, 163 N. Y. 542, 548, it was said: "Any action by the common council showing a clear intention to recognize the strip of land in question as a street was

an acceptance of it as a public highway. * * * A resolution formally and in terms accepting the street was unnecessary, for any official act on the part of the common council which treated it as a street and showed an intention to adopt it as one of the public streets of the city would be sufficient."

But acceptance of the dedication, even if there were no evidence thereof, would be presumed. *Acceptance* is involved in *delivery*, and the deed is presumed to have been delivered and accepted at its date.

Ten Eyck *v.* Whitbeck, 156 N. Y. 341, 352.
Foster *v.* Beardsley Scythe Co., 47 Barb. (N. Y.) 505.
Wilsey *v.* Dennis, 44 Barb. (N. Y.) 354, 359.

Moreover, acceptance of the deed is presumed from the beneficial nature of the grant.

Spencer *v.* Carr, 45 N. Y. 406, 410.
Munoz *v.* Wilson, 111 N. Y. 295, 303.

And this presumption applies to a dedication of land for public uses.

Child *v.* Chappell, 9 N. Y. 246, 257-8.

So far as concerns the dedication of the avenue by means of the Poillon deed, it is clear that the omission to record the deed is of no moment.

But the defendants also have a deed from Poillon (Record, pp. 82 *et seq.*) exactly similar to their deed from Benson; and the further question arises whether, by reason of the recording act, this deed from Poillon to the New York and Harlem Railroad Co., which was recorded in 1835, took prece-

dence over the deed from Poillon to the City of New York, which was not recorded.

It may well be doubted whether the recording act has any application to deeds of cession, creating public streets. Almost every deed conveying property bounded on a street, purports to convey a portion of the street, *i. e.*, to the centre line; but it has never yet been held that this fact affects in any degree the rights of the public.

In Matter of 39th Street, 1 Hill (N. Y.) 191, it appeared that the owner of certain land, over which 39th Street in New York City, as laid out on the city map, extended, conveyed a piece of land on the north side of the street to one Norton, bounding the land by the north side. Thereafter the said owner conveyed the fee of the street to John Jacob Astor, whose deed was recorded before that of Norton. The court held that the conveyance to Norton operated as a dedication of the street, and that the dedication was not affected by the prior recording of Astor's deed. The court said (p. 194): "It may be doubted, whether the recording statute could have any effect upon the right which had previously accrued to the public in consequence of the deed to Norton. * * * The grant to Astor, although it includes the land in the site of the street, plainly refers to and sanctions the commissioners' map, and thus manifests the assent of both grantor and grantee that the street, as it had been laid out under the act of 1807, should be a public street."

In the case at bar, the grant from Poillon to the railroad company also refers to and sanctions the map of the City of New York (Record, p. 81), filed by the commissioners appointed under N. Y. Laws of 1807, Ch. 115. Hence, the grant is directly within the rule of the above case.

But assuming, for the sake of argument, that the recording act does apply to deeds of cession,

it is easily shown that that fact does not aid the defendants in this case.

In order to get the benefit of the recording act, the New York and Harlem Railroad Co. must show a fulfilment of two requirements: (1) That it was a purchaser for a valuable consideration, and (2) That it was a purchaser in good faith.

N. Y. Rev. Laws of 1813, vol. 2, p. 406.
N. Y. Rev. Stats., vol. 1, p. 756, § 1.

The burden is upon the railroad company to prove both of the above propositions.

Westbrook *v.* Gleason, 79 N. Y. 23, 33.

Not only did the company fail to sustain this burden, but the evidence established the exact contrary of each of the above requisites.

(1) *The New York and Harlem Railroad Co. was not a purchaser for a valuable consideration.*

The consideration recited in the deed to the railroad company was nominal (Record, p. 83). But a valuable consideration, within the meaning of the recording act, means substantial value, and a nominal sum will not suffice.

Turner *v.* Howard, 10 App. Div. (N. Y.) 555, 559.

And the defendants failed to show by other proof that, as a matter of fact, any actual value was paid.

(2) *The New York and Harlem Railroad Co. was not a purchaser in good faith.*

This was specifically held by the Appellate Division in Fries *v.* N. Y. & Harlem R. Co., 57 App. Div. (N. Y.) 577. It appears from a number of considerations.

In the *first* place, the railroad company had notice from its own deed that Fourth Avenue had been dedicated as a public street. This deed conveyed property described as follows: "All that certain piece of land, situate, lying, and being in the twelfth ward of the city of New York, being part of one of the avenues laid out on the map of the city of New York, as the 4th avenue, and is included within a space of 24 feet wide running through the centre of said avenue" (Record, p. 83).

This recital was notice to the grantee of the facts recited.

Clapp *v.* Byrnes, 3 App. Div. (N. Y.) 284, 296; affd., 155 N. Y. 535.
Acer *v.* Westcott, 46 N. Y. 384.
Schwinger *v.* Hickok, 53 N. Y. 280, 285.
McPherson *v.* Rollins, 107 N. Y. 316, 322-3.
Howard Ins. Co. *v.* Halsey, 8 N. Y. 271, 274.

The recital was sufficient to put the railroad company upon inquiry as to the title to this land, described as part of one of the avenues of the City of New York. An obvious question was, Has this land ever been acquired by the city, by deed or otherwise? Five minutes' search in the Comptroller's office would have led an inquirer to the deed from Poillon to the city, and would have answered the question.

A party is chargeable with notice where the circumstances were such as ought reasonably to have

excited his suspicion, and led him to inquire; he is then presumed either to have made the inquiry and ascertained the facts, or else to have been guilty of a degree of negligence equally fatal to his claim to be considered a *bona fide* purchaser.

Baker *v.* Bliss, 39 N. Y. 70, 74.
Cambridge Valley Bank *v.* Delano, 48 N. Y. 326, 340.
Reed *v.* Gannon, 50 N. Y. 345, 350.
Ellis *v.* Horrman, 90 N. Y. 466, 473.
Kingsland *v.* Fuller, 157 N. Y. 507, 511.
Sweet *v.* Henry, 175 N. Y. 268, 276.

One who purchases with notice, actual or constructive, of a defect in the title, is not a purchaser in good faith, and cannot claim the protection of the recording act.

Ring *v.* Steele, 4 Abb. App. Dec. (N. Y.) 68, 70.
Schutt *v.* Large, 6 Barb. (N. Y.) 373, 381.
Haywood *v.* Shaw, 16 How. Pr. (N. Y.) 119.
Jackson *v.* Page, 4 Wend. (N. Y.) 585, 591.
Dingley *v.* Bon, 130 N. Y. 607, 613-4.

In the *second* place, it was provided by the act of 1807 (Laws 1807, p. 275) that the commissioners' plans, surveys, and maps, made pursuant to that act, should be final and conclusive in respect to both the city and the owners of the lands within the boundaries of the streets, "and in respect to all other persons whomsoever." And the act was declared to be a public act (Laws 1807, p. 279). Hence the act itself, and the map filed pursuant thereto (Record, p. 81), were notice to the New

York and Harlem Railroad Co., that the land of which it was taking a conveyance was forever devoted to street purposes; and this notice was sufficient to put the company upon inquiry for the purpose of ascertaining what kind of a title the deed was transferring.

In the *third* place, the charter of the New York and Harlem Railroad Co. provided (N. Y. Laws 1831, Ch. 263, § 16), that the company was not to construct its railroad along any of the streets or avenues designated on the map of the City of New York, whether such streets or avenues should have been opened or not, without the consent of the city authorities. The company, in taking such a charter, manifestly had notice that its rights in Fourth Avenue were at all times to be subordinate to the rights of the City of New York.

In the *fourth* place, the agreement (Record, p. 116) of January 9, 1832, between the New York and Harlem Railroad Co. and the City of New York, which embodied an ordinance passed by the common council on December 22, 1831, distinctly recognized that Fourth Avenue was then in existence, that it was absolutely subject to the regulation and control of the city authorities, and that the railroad was to be there by sufferance only. Moreover, in the ordinance (Record, pp. 102-3) passed by the board of aldermen on January 20, 1832, which date was just two days after the date of the deed to the railroad company, the said company is "authorized to take possession of *the ground owned by the common council* over which the line of said railroad is ordered to be constructed." It can scarcely be conceived that the officers of the railroad company were ignorant of this ordinance and of the rights of the City of New York in Fourth Avenue. The two ordinances just above mentioned were in evidence in the Lewis case, 162

N. Y. 202, and the court said of them (p. 221): "The company *recognized the title of the city* by assenting to resolutions passed by the common council both before and after it accepted the deed from Benson."

It may be well to add, that, as the defendants acquired no rights in Fourth Avenue by their deed, so also they have never acquired any by adverse possession. The fee of the avenue was and is in the City of New York, and the occupation of the defendants has always been under a license from the city (Record, pp. 102-3, 116). Possession under a license is never adverse.

Lewis *v.* N. Y. & Harlem R. Co., 162 N. Y. 202, 221.
1 Cyc. 1030.
Am. & Eng. Encyc. of Law (2d ed.), vol. 1, p. 794.

Moreover, no one can acquire title by adverse possession to any portion of a public street or highway.

Burbank *v.* Fay, 65 N. Y. 57, 69.
St. Vincent Orphan Asylum *v.* Troy, 76 N. Y. 108, 114.
Bliss *v.* Johnson, 94 N. Y. 235, 241.
Driggs *v.* Phillips, 103 N. Y. 77, 82-3.

(3) The Contract Subsisting Among Poillon's Grantees.

It is a principle of law existing in the State of New York, and apparently in every other state in the union, that where the owner of land lays it off into streets, and files a map representing the streets, and then makes conveyances of parcels of land, describing them as bounded on the said streets, these acts constitute an irrevocable dedication of the streets represented on the map,

whether they have ever been accepted by the public authorities or not; and this dedication is binding, not only upon the grantor, but upon all persons taking such conveyances from him, and amounts to an implied contract among all such persons that the strips of land represented on the map as streets shall remain such perpetually, with all the incidents legally pertaining thereto.

Taylor *v.* Hopper, 62 N. Y. 649.
White's Bank of Buffalo *v.* Nichols, 64 N. Y. 65, 73.
Matter of Eleventh Avenue, 81 N. Y. 436, 446.
Matter of Ladue, 118 N. Y. 213, 219-20.
Matter of Village of Olean *v.* Steyner, 135 N. Y. 341, 345.
Cunningham *v.* Fitzgerald, 138 N. Y. 165, 170.
Lord *v.* Atkins, 138 N. Y. 184, 190-1.
Holloway *v.* Southmayd, 139 N. Y. 390, 404-5.
Matter of Adams, 141 N. Y. 297, 300.
Matter of St. Nicholas Terrace, 143 N. Y. 621.
Haight *v.* Littlefield, 147 N. Y. 338, 341-2.
13 Cyc. 455.
Am. & Eng. Encyc. of Law (2d ed.), vol. 9, p. 57.

Thus in White's Bank of Buffalo *v.* Nichols, 64 N. Y. 65, 73, it was said: "When land is granted bounded on a street or highway, there is an implied covenant that there is such a way, that so far as the grantor is concerned, it shall be con-

tinued, and that the grantee, his heirs and assigns shall have the benefit of it."

The application of this rule of law to the case at bar may be easily shown.

In 1811 the commissioners who had been appointed by the legislature (N. Y. Laws 1807, Ch. 115) for the purpose of laying out the northern portion of Manhattan Island into streets and avenues, filed a map, which officially established the streets and avenues of Harlem, and represented Fourth Avenue as 100 feet wide. The portion of this map which embraces the locality in suit, was put in evidence (Record, p. 81) and constitutes p. 109 of the Record.

In 1826 some one (presumably Poillon) caused the land lying north of the "Old Harlem Road" to be surveyed, and a map thereof to be prepared and filed in the office of the Register of New York County (Record, p. 51). This map was entitled "Map of property formerly belonging to S. Benson and B. Vredenburgh, deceased, in the twelfth ward of the City of New York." It represented Fourth Avenue and the cross streets as they were established by the map of the City of New York, referred to just above, and it also represented lots laid off and numbered (Record, pp. 51-2).

In June, 1827, Poillon conveyed a portion of the premises in suit to one Stout (Record, p. 52), and another portion to one Perry (Record, p. 54), both portions being described as lots on the Benson and Vredenburgh map. Both of said deeds recognize and name Fourth Avenue. From Stout and Perry the plaintiff derives title (Record, pp. 53, 56). It should be added that the deeds to Stout and Perry conveyed no portion of the bed of Fourth Avenue, but carried title only as far as the side of the avenue; for at this time Fourth Avenue was only a street on paper, and in the City of New York,

under such circumstances, deeds carry title no further than to the side of the street.

City of Buffalo *v.* Pratt, 131 N. Y. 293, 297.

Graham *v.* Stern, 51 App. Div. (N. Y.) 406, 409-10; affd., 168 N. Y. 517.

In July, 1827, Poillon, who still retained title to the bed of Fourth Avenue, conveyed the same to the City of New York, in trust for street purposes (Record, pp. 50-1). The land conveyed was described with reference to the Benson and Vredenburgh map.

In 1832 Poillon assumed to convey to the New York and Harlem Railroad Co. a strip of land, 24 feet wide, lying in the centre of Fourth Avenue (Record, pp. 82-3). This strip was described with reference to the map of the City of New York.

All of the above-named deeds given by Poillon specifically named Fourth Avenue and specifically recognized it as one of the city streets.

It thus appears that the plaintiff, the defendants, and the City of New York all claim under Poillon as a common source of title, and all have deeds from him; and that all of these deeds specify Fourth Avenue as a public street, and refer to maps, then on file, on which the avenue appears as one of the streets of New York City.

Hence the rule of law above stated applies with full force and effect to the case at bar. The plaintiff, the defendants, and the City of New York are all under an implied contract that Fourth Avenue shall remain a public street perpetually, with all the incidents attached to such a street by the New York law.

The contract clause of the federal constitution

is applicable to implied as well as to express contracts.

Fisk *v.* Jefferson Police Jury, 116 U. S. 132.

SECOND POINT.

The obligation of these contracts precludes the erection of an elevated railroad in Fourth Avenue.

We come now to a construction of the various contracts pointed out above, for the purpose of determining their obligation.

(1) The Rule of Property Declared in the Elevated Railroad Cases.

In the elevated railroad cases, the New York courts declared that the effect of the several trusts created by the above contracts was to dedicate the streets of New York City to street purposes alone, and that the construction, maintenance, and operation of an elevated railroad in one of the said streets was not a legitimate street purpose, but, on the contrary, was a violation of the trust under which the street was held by the city.

In Williams *v.* Brooklyn El. R. Co., 126 N. Y. 96, 100, it was said: "The *Story* case and those which have followed it have settled the doctrine that the placing of an elevated railroad structure in a city street is inconsistent with its character as an open public street, and in the absence of the consent of the abutting owners to the erection, violates their rights as such, notwithstanding the title to the soil of the way is in the muncipality

and although the railroad company in erecting the structure acted under both legislative and municipal authority."

In Lahr *v.* Met. El. R. Co., 104 N. Y. 268, 288, it was said: "An elevated railroad, in the streets of a city, operated by steam power and constructed as to form, equipments, and dimensions like that described in the *Story* case, is a perversion of the use of the street from the purposes originally designed for it, and is a use which neither the city authorities nor the legislature can legalize or sanction, without providing compensation, for the injury inflicted upon the property of abutting owners."

And in Story *v.* N. Y. El. R. Co., 90 N. Y. 122, 178, it was said: "The authority attempted to be conferred by the legislature upon the defendant to take exclusive possession of portions of the public street, and to erect a series of iron columns on either side thereof, upon which a superstructure is to be erected spanning the street and filling the roadway at fifteen feet above the surface, thus excluding light and air from the adjoining premises, is an attempt to appropriate the street to a use essentially inconsistent with that of a public street, * * * and in respect to lands acquired under the act of 1813 violates the trust for which such lands are held for public use."

(2) Does this Rule of Property Apply to the Case at Bar?

Whether any given structure in a street is inconsistent with the public character of the street, is a question of fact.

Story *v.* N. Y. El. R. Co., 90 N. Y. 122, 173.

The decision of the trial court determined that the structure of which the plaintiff complains, was inconsistent with the public nature of the street. This finding of fact was affirmed by the Appellate Division, and thus became final; for the Court of Appeals has no power to review facts.

N. Y. Const., Art. 6, § 9.
N. Y. Code Civ. Pro., § 191, subd. 3.

Whatever was a question of fact in the state court, is a question of fact in this court.

Eastern Building & Loan Assn. *v.* Ebaugh, 185 U. S. 114, 121.

And this court will not re-examine the evidence, but will take the facts as found in the court below.

Egan *v.* Hart, 165 U. S 188.
Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S. 92, 103.
Bement *v.* Nat. Harrow Co., 186 U. S. 70, 83.

It therefore follows that the viaduct in front of the plaintiff's premises is a use inconsistent with the public character of the street, just as much as the other elevated railroads in New York City, and is a taking of the property of abutting owners, and a violation of the contracts by which they are protected, just as in the case of the other elevated roads.

To sum up the situation, we find an early statute, passed in 1813, declaring that the streets of New York City are held by the city in trust for certain public purposes. We find the highest court of the state steadily holding, for a score of years, that this trust precludes the erection of an elevated railroad. We find thousands of cases decided by the lower courts of the state in accord-

ance with the law as thus laid down. We find tens of thousands of conveyances made upon the faith of this rule of property, the purchasers paying their money and taking their deeds in the confident assurance that whatever might befall them in the way of taxes and assessments, they would be free for all time from the danger of having an elevated railroad erected in front of their houses. And we find the Court of Appeals holding, in the first of the Fourth Avenue viaduct cases, that the elevated railroad decisions were fully applicable to the situation there presented.

Lewis *v.* N. Y. & Harlem R. Co., 162 N. Y. 202.

When the learned judges of that court subsequently changed their minds, although they agreed that the elevated railroad cases were distinguishable, yet they seem to have found much difficulty in pointing out the distinctions.

I.

One "distinction" was said to be the fact that in the elevated railroad cases there was no change in the street grade, while in the case at bar "we have the case of a change in the grade of a street which necessitated a change in the location of the railroad tracks" (169 N. Y. 277-8). But the learned judge who said this was mistaken. There was no change in the grade of Fourth Avenue. The statute (§ 3) expressly provided that the space under the viaduct should be paved "*in accordance with the grades of Park Avenue, as now established.*" It would seem, therefore, that this distinction collapses.

II.

Another "distinction" was said to lie in the fact that the elevated railroad companies were only *permitted* by the legislature to erect their structures, while the defendants here were *commanded*. "In one case we have a mere consent or permission by the public authorities, while in the other we have an express and mandatory statute requiring the defendants to do precisely what they did" (169 N. Y. 284-5). In other words, the legislature having commanded the defendants to impair the obligation of a contract, that command legalized the whole transaction! This "distinction" assumes the constitutionality of the command, whereas that is precisely the question at issue.

III.

Yet another "distinction" was that in the elevated railroad cases the abutting owners had never consented to the construction of the railroad, while in one or two of the Fourth Avenue viaduct cases the railroad companies had acquired the right, as against the plaintiff, to operate their railroad, this right being derived through a deed from the plaintiff's predecessor in title (169 N. Y. 278-9). This distinction did exist in some of the viaduct cases. But it does not exist in the case at bar; for while the defendants have a deed from Poillon (Record, p. 83), this deed was given some time after Poillon had conveyed the fee of the street to the City of New York (Record, pp. 50-1), and also after he had conveyed the abutting property to the plaintiff's predecessors in title (Record, pp. 52, 54). After these conveyances Poillon retained in himself no right, title, or interest upon which his deed to the railroad company could operate; and this deed was consequently void.

IV.

Still another "distinction" was stated to be that in the elevated railroad cases "no attempt was made by the state to improve the street for the benefit of the public," while in the case at bar "the change was made for the public benefit as well as for that of the railroad" (173 N. Y. 556). This "distinction" depends upon the fact that the railroad in Fourth Avenue was first constructed on the ground, and then, to "improve" the avenue, was elevated upon a viaduct, while the other elevated railroads were built upon a viaduct in the first instance. But what difference can this make, when we remember that long before *any* railroad was built in Fourth Avenue, that strip of land became affected with a trust which excluded *elevated* railroads from that avenue for all time? The trust was never broken until this viaduct was erected; for it is the settled law of New York that a railroad operated (whether by steam or otherwise) *on the ground*, where the fee of the ground is in the municipality, is a legitimate street use.

Fobes *v.* Rome, etc., R. Co., 121 N. Y. 505.

The effect of this "distinction" is to leave property owners in New York City absolutely at the mercy of the legislature. Every avenue in the city (except Fifth Avenue) has upon it a surface railroad of some kind. The fee of the streets being in the city, these railroads, under the case just cited, are all entirely lawful. Considering the dense throngs that travel the streets of New York City, and the innumerable accidents that happen, it would unquestionably be an improvement, from a public point of view, to have all these railroads elevated, so as to abolish grade crossings. Can

the legislature in all such cases "improve the street for the benefit of the public" by elevating the railroad upon a viaduct? If so, a simple and obvious device has been discovered by which to impair the obligation of the trust to which the streets of New York City were dedicated. The method is simply this: First place your railroad on the surface of the street; and then elevate it. Under the Fobes case, no property owner can complain of the first step, and under the Muhlker case, no one can complain of the second. And so indirectly the legislature has accomplished what it could not do directly.

The courts have always declared emphatically that what the legislature cannot do directly, it cannot do indirectly.

Forster *v.* Scott, 136 N. Y. 577, 584.
People *v.* Coler, 166 N. Y. 1, 19.
Gilman *v.* Tucker, 128 N. Y. 190, 204.

Nor can the legislature violate the constitution, and redeem the violation by the claim that it was done "for the public benefit." It would be a curious result, if a state legislature were at liberty to pass a law impairing the obligation of contracts, provided only that this were done with the virtuous intent of "benefiting the public." The repudiation of contract obligations is quite usually sought to be justified by the plea of "the public benefit;" but the constitution of the United States may not be nullified in so simple and easy a fashion.

Minnesota *v.* Barber, 136 U. S. 313, 319.
Brimmer *v.* Rebman, 138 U. S. 78, 81.

The question is not whether the work is for the

public benefit. All railroads are for the public benefit, and it is only on this ground that the right of eminent domain is granted to them. Yet they must pay for what they take. Can private property be taken for public benefit without compensation? If not, then this assertion does not sustain this statute. The real question is whether the structure is a part of the use to which the strip of land called a street was devoted by the deeds and proceedings which vested title to it in the city as trustee. If it is such a use of the street, then there is *damnum absque injuria*. If not, there is a taking of the plaintiff's property by the building and operation of the elevated railroad structure, and the statute which authorizes this to be done without compensation, violates the contracts in evidence, and takes property without due process of law. This cannot be done by a statute which "directs" any more than by one which "authorizes." The statute was but an enabling act in any form. The Court of Appeals has construed this act to authorize the taking without compensation. The act is what that court says it is. Therefore, it violates the constitution.

(3) Can this Rule of Property be Changed by the State Courts?

The Story case, construing the act of 1813, and declaring that the trust provisions of that act would not permit the erection of an elevated railroad in a public street, was decided in 1882 (90 N. Y. 122). The Lahr case, re-iterating this rule, was decided in February, 1887 (104 N. Y. 268). This construction of the act of 1813 became a part of the act itself. Upon the faith of the law as thus expounded, the plaintiff purchased a part of his property in June, 1887 (Record, p. 54), and the remaining part in 1888 (Record, p. 56). And now

he finds that this rule of property on which he relied, a rule laid down and re-iterated by the New York courts in ten thousand cases, was but a broken reed, and that the calamity which the courts had so often declared should not happen to him, has happened.

Is the New York Court of Appeals at liberty to change its construction of the act of 1813, after the plaintiff has purchased property upon the faith of that construction? By this purchase the plaintiff became a party to the covenant described in the Lahr case as a covenant "which runs with the land and inures to the advantage of each successive grantee as he succeeds to the title" (104 N. Y. 291-2). The authorities hold that the construction of a statute by a state court, so far as contract rights acquired under it are concerned, becomes as much a part of the statute as if embodied in it, and that a change of construction is utterly ineffectual to impair those rights. "To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal."

Gelpcke *v.* Dubuque, 1 Wall. (U. S.) 175, 206.

In Louisiana *v.* Pilsbury, 105 U. S. 278, it appeared that in 1852 the legislature of Louisiana passed an act authorizing the City of New Orleans to issue certain bonds. This act, under the construction then put upon the state constitution by the highest court of the state, was constitutional; and the bonds were issued accordingly. In 1876 the Louisiana legislature passed another act, which need not be particularized, but which this court held to be a flagrant impairment of the obligation of the bonds. One of the bondholders having sought a remedy by mandamus, the Supreme Court of Louisiana changed its construction of the

Louisiana constitution, and held that the act of 1852, under which the bonds had been issued, was unconstitutional. A writ of error was then sued out of this court, and the question arose which of the two constructions placed upon the Louisiana constitution by the highest court of that state, was binding. On that question this court said (105 U. S. 294): "The exposition given by the highest tribunal of the state must be taken as correct so far as contracts made under the act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction. This doctrine applies as well to the construction of a provision of the organic law, as to the construction of a statute. The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend, that when a statute of two states, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own state, and enforced in accordance with it in all cases arising under it. *Christy* v. *Pridgeon*, 4 Wall. 196, and *Shelby* v. *Guy*, 11 Wheat. 361. The statute as thus expounded determines the validity of all contracts under it. A subsequent change in its interpretation can affect only subsequent contracts. The doctrine on this subject is aptly and forcibly stated by the Chief Justice in the recent case of *Douglass* v. *County of Pike*, 101 U. S. 677, 687. 'The true rule,' he observes, 'is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, not retroactive. After a

statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment.' "

In all essential particulars, the above case is on all fours with the case at bar. In both cases the state legislature passed an act,—in the Louisiana case for the issuance of bonds by a municipality, and in the New York case for the acquisition of streets by a municipality. In the Louisiana case the state courts placed a construction upon the state constitution which made the bonds valid; in the New York case the state courts placed a construction upon the act itself which made the streets exempt from elevated railroads. In both cases the plaintiff acquired property upon the faith of the law as thus interpreted, purchasing bonds in the Louisiana case, and real property in the New York case. In both cases the state legislature passed a second act, impairing the contract rights of the vendee of the property. In both cases the state courts then changed their former construction of the law, saying in the Louisiana case that the act which they first declared to be constitutional, was not constitutional, and saying in the New York case that the act which they first declared to be a bar to elevated railroads, was not a bar. In the Louisiana case this change of decision was adjudged by this court to be a violation of the supreme law of the land; and we respectfully submit that the same result must follow in the case at bar.

To the numerous cases cited in Louisiana *v.* Pilsbury, we shall add only one, Ohio Life Ins., etc., Co. *v.* Debolt, 16 How. (U. S.) 416. In this

case it was said by Taney, C. J. (p. 432): "The duty imposed upon this court to enforce contracts honestly and legally made, would be vain and nugatory, if we were bound to follow those changes in judicial decisions which the lapse of time, and the change in judicial officers, will often produce. The writ of error to a state court would be no protection to a contract, if we were bound to follow the judgment which the state court had given, and which the writ of error brings up for revision here. And the sound and true rule is, that if the contract when made was valid by the laws of the state, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the state, or decision of its courts, altering the construction of the law."

THIRD POINT.

The act in question, in providing for the erection of an elevated railroad in Fourth Avenue, is unconstitutional and void.

We have shown above that the evidence in this case establishes three contracts; that the obligation of each of these contracts, as construed by the New York courts, is that Fourth Avenue shall not be devoted to uses inconsistent with its character as an open public street; that an elevated railroad, according to the construction of the New York courts, is an inconsistent street use; and that this construction of the said contracts cannot, so

far as the plaintiff is concerned, be altered or modified by any change of judicial decision.

The remaining question is one which, in effect, has already been answered, namely, whether the obligation of these contracts has been impaired by Chapter 339 of the New York Laws of 1892, which provides for the erection and operation of an elevated railroad in Fourth Avenue.

The New York courts until recently have had but one answer for this question. In Lahr *v.* Met. El. R. Co., 104 N. Y. 268, 291, it was said: "Although it may be assumed that the municipality by proceedings, to open a street, acquires the fee to the land taken, it is yet a qualified fee, held in trust under the statute for a certain use, and that use cannot be departed from *without violating an essential condition of the contract under which the land was obtained.*" And on page 292: "The act of the legislature under which the defendant was organized, and from which its authority to take the property in question is claimed, if held to authorize an interference therewith without making compensation, is plainly obnoxious to the objection that it sanctions the taking of private property for public use, *and is also in conflict with that provision of the federal constitution prohibiting state legislatures from passing laws impairing the obligation of contracts.*"

In People *v.* Comrs., 53 Barb. (N. Y.) 70, 74, it was held that when the public authorities take the land of an individual for the purpose of a public highway, and pay the proprietor therefor, the transaction becomes a fixed contract between them, which is within the clause of the federal constitution forbidding the states to pass any law impairing the obligation of contracts.

The total lack of power in the legislature to abrogate the trust under which the City of New York

holds its streets, is stated at length in other New York cases.

Story *v.* N. Y. El. R. Co., 90 N. Y. 122, 157, 160.
Lahr *v.* Met. El. R. Co., 104 N. Y. 268, 291.
Kane *v.* N. Y. El. R. Co., 125 N. Y. 164, 183.
Williams *v.* N. Y. Cent. R. Co., 16 N. Y. 97, 108.
Trustees *v.* Auburn, etc., R. Co., 3 Hill (N. Y.) 567, 569.

And in very numerous other authorities it has been held that where land is dedicated to the public in trust for public purposes, the legislature has no power to abrogate the trust by devoting the land to inconsistent purposes, except upon making compensation.

Railroad Co. *v.* Schurmeir, 7 Wall. (U. S.) 272, 289-90.
U. S. *v.* Ill. Cent. R. Co., 2 Biss. (U. S.) 174, 181.
Packet Co. *v.* Sorrels, 50 Ark. 466, 473.
Canastota Knife Co. *v.* Newington Tramway Co., 69 Conn. 146, 172.
City of Jacksonville *v.* Jacksonville R. Co., 67 Ill. 540, 543.
City of Chicago *v.* Ward, 169 Ill. 392, 412.
Warren *v.* Mayor, 22 Iowa 351,356-7.
Franklin Co. *v.* Lathrop, 9 Kans. 453, 463.
Schurmeier *v.* St. Paul, etc., R. Co., 10 Minn. 82, 105; affd., 7 Wall. (U. S.) 272, 289.
City of St. Paul *v.* Chicago, etc., R. Co., 63 Minn. 330, 352.

Belcher Sugar Refining Co. *v.* St. Louis, etc., Co., 82 Mo. 121, 125-6.
Cummings *v.* City of St. Louis, 90 Mo. 259, 263-4.
State *v.* Laverack, 34 N. J. L. 201.
Trustees *v.* Mayor, 19 N. J. Eq. 355, 357.
Methodist Episcopal Church *v.* Penna. R. Co., 48 N. J. Eq. 452.
Le Clercq *v.* Gallipolis, 7 Ohio 217.
Board of Education *v.* Edson, 18 Ohio St. 221, 225.
Portland, etc., R. Co. *v.* City of Portland, 14 Oregon 188, 197.
Lamar Co. *v.* Clements, 49 Tex. 348.

In Railroad Co. *v.* Schurmeir, 7 Wall. (U. S.) 272, 289, it appeared that the owner of certain ground bordering on the Mississippi River and constituting a part of the city of St. Paul, surveyed, laid out, and platted the ground into blocks, streets, and lots, and caused the plat to be recorded. Under the local statute then in force, this act operated to vest the fee simple in the public for the uses named in the plat, and no other, the statute declaring that "land intended to be for streets, alleys, ways, commons, or other public use, * * * shall be held in the corporate name, in trust, to and for the uses and purposes set forth, and expressed or intended." On the plat an open space bordering on the river was designated as "Landing." The owner subsequently sold two lots fronting on this space to one Schurmeir. Thereafter a railroad company, under a grant from the legislature, began to construct a railroad over the said space. Schurmeir brought suit in the state court for an injunction, and obtained it. On appeal to the U. S. Supreme Court, this decree was affirmed, the court saying: "Attempt

is also made to justify the acts of the respondents, as grantees of the state, upon the ground that the complainant, in dedicating the premises to the public as a street, levee, and landing, parted with all his title to the same, and that the entire title vested in fee in the state. * * * Suppose the construction of that provision, as assumed by the respondents, is correct, it is no defence to the suit, because it is nevertheless true that the municipal corporation took the title in trust, impliedly, if not expressly, designated by the acts of the party in making the dedication. They could not, nor could the state, convey to the respondents any right to disregard the trust, or to appropriate the premises to any purpose which would render valueless the adjoining real estate of the complainant."

We add a few other cases in which the courts have held the obligation of a contract to be impaired.

In Pennsylvania *v.* Wheeling, etc., Bridge Co., 13 How. (U. S.) 518, 565-6, it appeared that by a compact entered into between Virginia and Kentucky and sanctioned by Congress, it was provided "that the use and navigation of the River Ohio * * * shall be free and common to the citizens of the United States." Thereafter the legislature of Virginia passed an act under color of which the defendants constructed a bridge over the Ohio River. The suit was brought to enjoin the maintenance of this bridge on the ground that it was an obstruction to navigation. It was held that no state could violate the above compact by obstructing the navigation of the river, and that more than this was not necessary to give a civil remedy for an injury done by the obstruction.

In several other bridge cases it has been held that where a corporate franchise, amounting to a contract with the state, prohibits the erection of a

bridge within a certain locality, a subsequent act of the legislature which authorizes the erection of a bridge within the specified limits, impairs the obligation of the contract, and is unconstitutional.

Bridge Proprietors *v.* Hoboken Co., 1 Wall. (U. S.) 116, 144-5.
The Binghamton Bridge, 3 Wall. (U. S.) 51.

Finally, we add that this clause of the constitution is to receive a liberal construction. In Murray *v.* Charleston, 96 U. S. 432, 448, it was said: "There is no more important provision in the federal constitution than the one which prohibits states from passing laws impairing the obligation of contracts, and it is one of the highest duties of this court to take care the prohibition shall neither be evaded nor frittered away. Complete effect must be given to it in all its spirit. The inviolability of contracts, and the duty of performing them, as made, are foundations of all well-ordered society, and to prevent the removal or disturbance of these foundations was one of the great objects for which the constitution was framed."

FOURTH POINT.

The act in question is also unconstitutional in that it directs the taking of property without due process of law.

It is the law of New York that the owner of premises abutting on a public street has, as appurtenant to his premises, certain easements of light,

air, and access in the street; that these easements are property; and that the erection and operation of an elevated railroad in the street constitutes a taking of this property.

Story *v.* N. Y. El. R. Co., 90 N. Y. 122, 171, 179.
Lahr *v.* Met. El. R. Co., 104 N. Y. 268, 288-9.
Fobes *v.* Rome, etc., R. Co., 121 N. Y. 505, 517.
Bohm *v.* Met. El. R. Co., 129 N. Y. 576, 587, per Peckham, J.
Sperb *v.* Met. El. R. Co., 137 N. Y. 155, 160.

In the case at bar it is conceded that the plaintiff has easements in Fourth Avenue. The trial court so found (Record, pp. 22-3), and the Appellate Division affirmed the finding. The Court of Appeals had no jurisdiction to review this question of fact, and did not attempt to do so. The opinion speaks of the "partial destruction" of these easements of light, air, and access (Record, p. 170, end), and thus concedes their existence. The Court of Appeals in a still later case has recognized the easements of the Fourth Avenue abutters, and, while denying a recovery for the main viaduct structure, has allowed damages for stations.

Dolan *v.* N. Y. & Harlem R. Co., 175 N. Y. 367.

Thus the Court of Appeals distinctly admits that the Park Avenue property owners possess the so-called urban easements in the avenue.

In the act in question we have a plain case of a statute which provides for the taking of the plaintiff's property, yet makes no provision for notice

to him, affords him no opportunity for a hearing, and contains not a syllable in reference to compensation for the property taken.

Notice, and a hearing of some kind, or an opportunity to be heard, are necessary elements of due process of law.

Roller *v.* Holly, 176 U. S. 398, 409.
Carson *v.* Brocton Sewerage Commission, 182 U. S. 398, 401.

So, also, after some doubt and uncertainty, it is now firmly established that an absolute requisite of due process of law is *compensation.*

Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226, 236, 241.
Tindal *v.* Wesley, 167 U. S. 204, 222-3.
Holden *v.* Hardy, 169 U. S. 366, 390-1.
Norwood *v.* Baker, 172 U. S. 269, 277.

It may be added, finally, that the prohibition in the Fourteenth Amendment, applies to all the instrumentalities of the state, to its legislative, executive, and judicial authorities.

Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226, 233-4.
Scott *v.* McNeal, 154 U. S. 34, 45.

FIFTH POINT.

Should the act in question be declared unconstitutional, no inequitable results would ensue.

The learned counsel for the defendants seem to think that if the act in question should be declared unconstitutional, the courts would be bound to order the removal of the viaduct, that the large sums expended upon it would be lost, that the trains of the defendants would cease running, and that incalculable inconvenience would result to the public.

But all that we claim, is, that this act is unconstitutional *as to this plaintiff* and others similarly situated. No one who has not a property interest to protect, can question it. In Ogden *v.* Saunders, 12 Wheat. (U. S.) 213, 316, it was said: "It is not the terms of the law, but its effect, that is inhibited by the constitution. A law may be in part constitutional, and in part unconstitutional. It may, when applied to a given case, produce an effect which is prohibited by the constitution; but it may not, when applied to a case differently circumstanced, produce such prohibited effect."

See also Cooley, Constitutional Limitations (7th ed.), p. 250.

Under the execution of the laws, no one may cry out, unless he is hurt. The only persons who can complain of this statute are the plaintiff, and a comparatively few other property owners, whose rights have been impaired. As to such persons, it is the settled policy of the New York courts not to grant an absolute injunction. There has been a recent and striking instance of this. One of the elevated railroads in New York City constructed a

third track under a law which was subsequently held to be unconstitutional.

> Auchincloss *v.* Met. El. R. Co., 69 App. Div. (N. Y.) 63, 69.

After this decision, the property owner sought to obtain an absolute injunction, directing the removal of the third track. But the court refused to grant it, saying that the complete enforcement of the plaintiff's legal right would work hardship to the defendant and inconvenience to the public, while the plaintiff's injuries could be sufficiently compensated in money damages. And accordingly the court fixed the amount of the plaintiff's damages, and awarded merely the conditional injunction usual in elevated railroad cases.

> Auchincloss *v.* Met. El. R. Co., N. Y. Law Journal, July 11, 1903, p. 1342.

To the same effect is Knoth *v.* Manhattan R. Co., N. Y. Law Journal, November 17, 1904, p. 587.

The same result might be accomplished (as in the Story case, 90 N. Y. 122, 179) by suspending the injunction long enough to allow the defendants to acquire a right of way by agreement or by condemnation proceedings.

Thus it is clear that the only effect of declaring the act unconstitutional, would be to compel the defendants to compensate the plaintiff for the injuries done him; and it is certainly not inequitable that the defendants should pay for their right of way, whether that way be on the surface of the ground or in the air. The defendants are the owners of the viaduct (People *v.* Comrs., 101 N. Y. 322) and they should answer for all the damages that it causes.

If the situation is disagreeable to the railroad

companies, it is no more than they contracted for at the outset. They were content to accept a charter which provided that "the legislature may at any time alter, amend, modify, or repeal this act."

N. Y. Laws 1831, Ch. 263, § 18.

The legislature having exercised its reserved prerogative, the defendants cannot justly complain. But the plaintiff has never agreed that *his* rights should be subject to legislative control. And if some one must suffer, he certainly ought not to be the one.

SIXTH POINT.

The judgment under review should be reversed, and the case remanded.

ELIHU ROOT,
J. C. BUSHBY,
L. M. BERKELEY,
Of Counsel for Plaintiff in Error.

APPENDIX I.

EXTRACT FROM RIVER AND HARBOR ACT OF 1890 (U. S. STATS. AT LARGE, VOL. 26, P. 437).

"Improving Harlem River, New York: Continuing improvement, two hundred and fifty thousand dollars; and the Secretary of War is directed to cause the low bridges now crossing said Harlem River to be replaced by other bridges at the expense of the owners thereof as soon as the necessary legislation, if any such legislation be necessary, shall have enabled the change in grade to the approaches of said bridges, thus required, to be made, the owners of said bridges being allowed a reasonable time in which to complete the work necessary for said approaches. Said bridges shall leave a clear space, between the under sides thereof and the high water of spring tides, of twenty-four feet, and shall be provided with draw-spans and draws of the width and length to be determined by the Secretary of War, and shall in all respects comply with this law and conform to the requirements of the Secretary of War: *Provided,* That the Secretary of War shall prescribe the times and regulations for the opening and operating of the draws in said bridges, but said draws shall not be opened except for vessels propelled by steam with or without vessels in tow; nor shall they be required to be opened at any times other than between ten o'clock in the forenoon and five o'clock in the afternoon."

APPENDIX II.

CHAPTER 339 OF THE NEW YORK LAWS OF 1892.

AN ACT to regulate, improve and enlarge Park avenue above One Hundred and Sixth street in the city of New York, and providing for the passage of intersecting streets, under the railroad structure of the New York and Harlem Railroad Company, and for the elevation of said railroad structure, and for changing the grade of said railroad, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary by reason of such change in structure and grade and increased elevation of bridge, and for other purposes.

APPROVED by the Governor, April 19, 1892. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Change of Railroad Grade.

SECTION 1. The grade of the New York and Harlem railroad between One Hundred and Sixth street and the Harlem river, as now established by chapter seven hundred and two of the laws of eighteen hundred and seventy-two, shall be changed and altered as follows: Commencing at or about One Hundred and Sixth street, the grade shall ascend going northwardly at the rate of forty feet per mile to One Hundred and Sixteenth street; and thence the grade shall descend, going northwardly, at the rate of twenty-four and seven-tenths feet per mile to One Hundred and Twenty-ninth street; thence still descending northwardly

ht the rate of twenty-nine and six-tenths feet per mile to a point about eighty feet southwardly from the present legally established bulkhead line on the south side of the Harlem river; thence going northwardly, the grade over the Harlem river shall be level at an elevation of twenty-six feet above high-water line of spring tides, to a point about eighty feet north of the present legally established bulkhead line, on the north side of the Harlem river; thence descending on a grade of not exceeding thirteen feet per mile to a point twenty feet south of the south line of One Hundred and Thirty-eighth street; thence still descending northwardly on a grade of not exceeding thirty-seven feet per mile to the south line of One Hundred and Forty-fourth street; thence still descending on a grade not exceeding twenty-nine feet per mile to the level of the roadbed of the New York and Harlem railroad, as now legally established and constructed, at or about the south line of One Hundred and Forty-ninth street.

Existing Viaduct.

§ 2. The viaduct structure, as it now exists between One Hundred and Sixth and the south side of One Hundred and Eleventh streets. shall be adapted to the new grade line as established by the preceding section, by raising its parapet walls, and filling in with earth or other materials between the same, to the height required by the new grade; and from the south side of One Hundred and Eleventh street to the Harlem river, the railroad tracks and roadbed shall be carried on a viaduct structure of iron or steel, or of both of these materials combined, consisting of three lines of plate girders, supported on columns of iron or steel, standing on suitable pedestals of stone or brick masonry, with foundations under the same

New Viaduct Structure.

of timber piling, or concrete, as may be found necessary.

Present Cut and Bridges.

§ 3. The present depressed cut of the railroad, extending from One Hundred and Fifteenth street to One Hundred and Thirty-third street shall be filled in with earth or other suitable material, and its parapet walls taken down below the line of the under side of the avenue paving; and the bridge which now carries One Hundred and Sixteenth street, the roadway between One Hundred and Seventeenth and One Hundred and Eighteenth streets, the bridges which carry One Hundred and Nineteenth, One Hundred and Twentieth, One Hundred and Twenty-first, One Hundred and Twenty-second, One Hundred and Twenty-third, One Hundred and Twenty-fourth, One Hundred and Twenty-fifth, One Hundred and Twenty-sixth, One Hundred and Twenty-seventh, One Hundred and Twenty-eighth and One Hundred and Twenty-ninth streets over the said depressed cut, also the foot bridges over the same at One Hundred and Thirtieth and One Hundred and Thirty-first streets shall be removed, and the space between the exterior lines of the said parapet walls shall form a part of Park avenue, and be paved with stone paving of the same character and description as Park avenue is now paved, and shall be laid in accordance with the grades of Park avenue, as now established, and the iron bridges which now carry the railroad tracks over One Hundred and Twelfth and One Hundred and Thirteenth streets shall also be removed, or be raised to the new grade line.

Refilling and Paving.

Height of New Viaduct.

§ 4. The new viaduct structure of iron or steel, provided for by section two, shall be built at such height that all streets from and inclusive of One Hundred and Eleventh street to the Harlem river, shall be passed over with a clear height of not less

than fourteen feet above the surface of the pavement, and One Hundred and Fourteenth, One Hundred and Fifteenth, One Hundred and Seventeenth, One Hundred and Eighteenth, One Hundred and Thirtieth, One Hundred and Thirty-first, One Hundred and Thirty-second, One Hundred and Thirty-third streets and the exterior street along the bulkhead of the south side of the Harlem river, which do not now cross the said railroad, shall be opened, regulated and paved, and shall pass under the new viaduct structure the same as provided for all other streets in this section. [*As amended by Laws 1894, Ch. 548.*]

Streets to be Opened.

§ 5. The supporting columns of the new viaduct structure shall divide it into spans of about sixty-five feet center to center longitudinally with the railroad and be disposed in groups of three transversely at right angles, one column on the center line of the railroad, and one column on each side of said center line at a distance not to exceed twenty-eight feet each way between the center of said columns, excepting that at the crossings of One Hundred and Sixteenth and One Hundred and Twenty-fifth streets, and the exterior street (being one hundred feet in width) columns may be erected on the center line of said streets and also on the curb lines; and the said columns shall not exceed twenty-four inches by twenty-four inches of extreme external diameter above the level of the street pavement and shall be protected at their bases on the pavement with circular cast-iron wheel guards of sufficient diameter to defend the shafts of said columns from abrasion.

Columns, how Placed and Size.

§ 6. The railroad tracks shall be carried on a solid, tight floor, and the drainage water shall be conducted by pipes into the sewers.

Drainage.

Station Houses and Platforms.

§ 7. The New York and Harlem Railroad company, or its lessee, the New York Central and Hudson River Railroad company, is hereby authorized and directed, to erect and maintain a station at One Hundred and Twenty-fifth street, and for that purpose to erect and maintain a station building in Park avenue, extending from the north line of One Hundred and Twenty-fifth street to the south line of One Hundred and Twenty-sixth street, forty feet in width, with suitable stairways on the easterly and westerly sides thereof, not exceeding five feet in width. The northerly and southerly center line of the said station building shall be the center line of Park avenue. Suitable sidewalks and curbs shall be laid on each end and side of the said station building, and there shall be left a clear roadway, between the curb on the easterly side of Park avenue and the curb on the easterly side side* of the said station building and between the curb on the* of the said station building and between the curb on the westerly side of Park avenue and the curb on the westerly side of the said station building, of twenty-six and one-half feet in width. For the purposes of the said station at One Hundred and Twenty-fifth street, the said viaduct structure shall be of such width as may be necessary for the construction and maintenance of suitable platforms and station buildings between the tracks, and for the necessary approaches to such platforms and station buildings, but not to exceed eighty-two feet in width, except that the cross girders to sustain such platforms, station buildings and approaches, may be supported on columns erected along the curb lines of Park avenue between One Hundred and Twenty-third street and One Hundred and Twenty-seventh street, the said columns not to exceed fifteen inches square in

Sidewalks.

Columns for Support of same

* So in the original.

size above the surface of the pavement. Suitable stairways, not exceeding five feet in width, shall also be erected and maintained from the south side of One Hundred and Twenty-fifth street to the said platforms and station buildings between the tracks. The plan of the said improvement heretofore approved by the commissioner of public works of the city of New York and filed in the office of the comptroller of the city of New York on the twelfth day of November, eighteen hundred and ninety-two, as amended and modified by the plan approved by the commissioner of public works of the city of New York, and filed in the office of the comptroller of the city of New York, on the twenty-first day of June, eighteen hundred and ninety-four, is, and shall be deemed to be, hereby amended and modified to conform to the provisions of this section, and as so amended and modified, is hereby authorized, ratified and confirmed, and the said, the New York and Harlem Railroad company, or its lessee, the New York Central and Hudson River Railroad company, is hereby authorized to take down so much of the structure heretofore erected between One Hundred and Twenty-third street and One Hundred and Twenty-seventh street in accordance with the said plan of the said improvement filed in the office of the comptroller of the city of New York, on the twelfth day of November, eighteen hundred and ninety-two, as is not necessary or required for the purposes of the station in this section provided for. *(As amended by Laws 1896, Ch. 594.)*

Stairs.

Plan for Improvement Amended.

Power to Take down Structure.

§ 8. The Harlem River shall be crossed by the four tracks of the said railroad on a pivot draw-bridge, the center of which shall coincide with the center of the draw-bridge now standing, but the new bridge shall be so built that the lowest part of its structure shall have a clear height of

Bridge over Harlem River.

twenty-four feet above high water of spring tides, and shall provide passageway for vessels on both sides of the center pier, each of one hundred feet width in clear, measured at right angles to the axis or current of the river at the point of its passage under this bridge; the extreme ends of the draw-bridge shall be sustained on abutments of stone masonry, and a protection pier of proper width, to effectually protect the structure of the draw-bridge, when swung open for the passage of vessels, may be built in the river on a line parallel with the direction of the current of the river, no part of which, however, shall in any way diminish the clear width of one hundred feet passageway on both sides of the same.

Structure north of Harlem River.

§ 9. From the north abutment of the Harlem River bridge the new grade of the railroad shall be carried on a viaduct structure consisting of parallel retaining walls of stone masonry, with earth filling, to the south side of One Hundred and Thirty-eighth street, with suitable openings for the passage of One Hundred and Thirty-fifth street and Mott avenue; over which streets the railroad shall pass on bridges of iron or steel supported on stone abutments; the railroad tracks shall be carried over One Hundred and Thirty-eighth street on a bridge of iron or steel, of one hundred feet in width, divided into three spans consisting of one clear span over the roadway between the curb lines, and with side spans over each of the sidewalks supported on stone masonry abutments built upon the north and south lines of said street, and by iron columns on the curb lines.

Change of Grades, 138th and 144th Streets.

§ 10. In order to secure fourteen feet clear of headroom under the lowest part of the bridge carrying the railroad tracks over One Hundred and Thirty-eighth street, the grade level of One Hundred and Thirty-eighth street as now established,

shall be altered and be depressed under the said bridge, one and one-half feet, and the bridge which now carries One Hundred and Forty-fourth street over the depressed tracks of the New York and Harlem railroad may be raised to a height not exceeding seven and one-half feet above its elevation as now constructed, and the grades of the streets and avenues forming the approaches to the said bridge, that is to say, on One Hundred and Thirty-eighth street between Mott avenue and Railroad avenue, and on One Hundred and Forty-fourth street eastwardly and westwardly from the railroad bridge, and on Railroad avenue northwardly and southwardly from One Hundred and Forty-fourth street, shall be altered and changed to correspond with the depression of One Hundred and Thirty-eighth street grade, and the raising of One Hundred and Forty-fourth street bridge, in such manner as may be prescribed by the municipal authorities having jurisdiction in the premises.

Filling, 138th to 149th Streets.

§ 11. North of the north abutment of One Hundred and Thirty-eighth street bridge to One Hundred and Forty-ninth street the roadbed of the railroad may be raised to its new grade level by filling of earth, or in any other way, at the discretion of the railroad company.

Temporary Bridge and Use of Street.

§ 12. The New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company, during the making of the change in the elevation of the aforesaid structure and bridge is authorized to construct a temporary bridge over the Harlem river, and to maintain such temporary structures as may be found necessary for the operation of its road, and to occupy any part or parts of any public streets or avenues in the city of New York necessary for such purposes, all of which, how-

ever, shall be done under the approval, direction and sanction of the board hereinafter appointed.

Board of Commissioners.

§ 13. There shall be a board whose duty it shall be to execute, direct and superintend the construction of the said improvement from One Hundred and Sixth street to the line of the Harlem river or point at which the new bridge over the Harlem river, authorized by this act to be constructed, shall commence, which board shall be called "The Board for the Park Avenue Improvement above One Hundred and Sixth Street." It shall

Duties of Commissioners.

be the duty of the said board to file a monthly statement under oath of the items of its expenditures with the comptroller of the city of New York. Regular accounts of all its transactions shall be kept by the board, which shall be open to the inspection of the officers of the said railroad company and to the comptroller of the city of New York. The said board is authorized to pass suitable by-laws for its own regulation and government, and to select a presiding officer and secretary from its number. It shall keep a record of all its proceedings. The

Of whom Composed.

said board shall consist of five members, to be appointed by the mayor of the city of New York, two of whom shall be civil engineers experienced in railroad and bridge construction. In case of the death, removal or resignation of any member of the said board, or their or either of their

Vacancies.

successors, the vacancy shall be filled by appointment by the mayor of the city of New York. The said board is hereby authorized and directed to take the entire charge and control of the said improvement from One Hundred and

Powers.

Sixth street to the line of the Harlem river, or the point at which the new bridge over the Harlem river authorized by this act, to be constructed shall commence, and to execute the same in con-

formity with the provisions of this act, in a substantial and workmanlike manner. Such work shall be done, so far as possible, by contract. Advertisements shall be made as the board shall direct, for bids or proposals for the work proposed from time to time to be contracted, and the contracts shall be awarded to the lowest responsible bidder who shall be approved by the board. The contractors shall be required to give such bonds for the faithful performance and execution of the work as the said board shall require. Each member of the board shall receive ten dollars for every day that he shall be employed in the performance of his duties under this act. The board may appoint one of its number as a general superintendent of the work. The said board shall prepare plans of said improvement in conformity with this act, which when approved by the commissioner of public works shall be filed in the office of the comptroller of the city of New York. The said board shall also file with the comptroller specifications and an estimate of the cost of said work. The members of the said board before entering upon the performance of their duties, shall severally take and subscribe an oath or affirmation before a judge of a court of record of the city of New York, faithfully to perform the trusts and duties required of them by this act and as a member of the said board, which oath shall be filed in the office of the comptroller of the city of New York. All work to be done upon or under any street, between One Hundred and Sixth street and the south line of the Harlem river shall be done under the supervision of the department of public works, and the commissioner of public works shall appoint necessary inspectors and engineers for the supervision of such work, who shall be paid a reasonable compensation to be included in the cost of said improvement.

Contracts.

Salary of Commissioners.

Filing Plans, etc.

Oath of Office.

Supervision by Dept. of Public Works.

Inspectors and Engineers.

§ 14. When the said plans, specifications and estimate shall be made and filed as aforesaid, or when any amended plans, specifications and estimate authorized by law shall be so filed, the expense and cost of the said improvement shall be borne and paid by the New York and Harlem railroad company, or its lessee, the New York Central and Hudson River railroad company, and the mayor, aldermen and commonalty of the city of New York, in equal proportions as the construction of the said improvement progresses. When and as often as it shall appear by the certificate of the superintending engineer of the work of the said improvement, duly certified by the aforesaid board, that the sum of twenty-five thousand dollars has been expended thereon by either of said railroad companies, specifying the portions and divisions of the said improvement where the said expenditure has been made, the comptroller of the city of New York shall draw his warrant upon the treasury of the said city in favor of the treasurer of the said railroad company bearing and paying said expense, for one-half of the said sum, which shall be duly signed and countersigned by the proper officers of said city, upon whom by law is devolved the duty of signing and countersigning warrants, and deliver it to the said railroad company for and on account of the one-half of the expense and cost of the said improvement to be borne and paid by the city as aforesaid; but in no event shall the proportion of the cost of the said improvement to be paid by the city of New York exceed the sum of seven hundred and fifty thousand dollars, and if the cost of said improvement shall exceed the sum of one million five hundred thousand dollars, then the entire excess over and above such sum shall be borne and paid by the New York and Harlem railroad company, or its

Cost and Payments.

lessee, the New York Central and Hudson River railroad company, except, nevertheless, that the mayor, aldermen and commonalty of the city of New York shall also bear and pay, in the manner in the act hereby amended provided for, one-half of the expense of all work made necessary and done pursuant to any amended plans and specifications made and filed as provided for by this amendment to said act, in excess of the cost and expense of constructing or carrying out the said improvement in accordance with the plans and specifications heretofore made and filed; and the New York and Harlem railroad company, or its lessee, the New York Central and Hudson River railroad company, shall bear and pay, in the manner in the act hereby amended provided for, the remaining one-half of the said cost and expense; and the certificates of payment by either of said railroad companies, in this section hereinbefore provided for, to be made by the superintending engineer of said improvement, duly certified to by the aforesaid board, to cover any expense or cost that may be made necessary by any such amended plans and specifications, shall state the fact that the expense and cost in the said certificate specified was made necessary by such amended plans and specifications, and said certificates shall be conclusive evidence of such fact. But nothing herein contained shall be construed to obligate the city of New York to pay as its share of the work done under such amended plans and specifications a greater sum than fifty thousand dollars of such additional expense. [*As amended by Laws 1894, Ch. 548.*]

§ 15. For the purpose of raising the sum or amount of the cost of the said improvement to be borne and paid by the city of New York, it shall be the duty of the comptroller and other proper

Bonds to be Issued.

officers of the city of New York to borrow, from time to time, by the issue of bonds, bearing such rates of interest as they may deem proper, not exceeding four per centum per annum, payable semi-annually, such sums as may be necessary to pay the one-half part of all amounts called for by the certificates of the superintending engineer provided for in the preceding section of this act. Such bonds shall be known as assessment bonds for the Park avenue improvement above One Hundred and Sixth street. Such bonds shall be issued by the comptroller, when authorized by the board of estimate and apportionment, at not less than par, for such period as said comptroller may determine, not exceeding five years. Such bonds shall be sold by the comptroller by inviting proposals therefor by public advertisement for not less than ten days, and the same shall be awarded to the highest bidder therefor, and said proposals shall be only publicly opened by the comptroller in the presence of the commissioners of the sinking fund, or such of them as shall attend at the time and place specified in the advertisement therefor. The comptroller with the approval of said commissioners, shall determine what, if any, of such proposals shall be accepted, and upon the payment into the city treasury of the amounts due by the persons whose bids are accepted respectively, certificates therefor shall be issued to them as authorized by law.

How sold.

Commissioners of Assessment.

§ 16. Upon the completion of such work and final payment by the comptroller of the proportion of the cost of said improvement to be borne by the city of New York, the mayor, aldermen and commonalty of the city of New York by the counsel to the corporation of said city, is hereby authorized and directed to make application to a special term of the supreme court in and for the

first department, for the appointment of commissioners of assessment, and the said court shall thereupon name three discreet and disinterested persons, being citizens of the city of New York, as such commissioners of assessment, for the purpose of performing the duties hereinafter mentioned in that behalf prescribed. Twenty day's notice of such applications shall be published in the City Record and in at least two other newspapers published in the city of New York. Upon the appointment of said commissioners, they shall severally take and subscribe an oath or affirmation before some officer authorized to administer oaths, faithfully to perform the trusts and duties required of them by this act, which oaths shall be annexed to and filed with their report. In case of the death, resignation or refusal to act of any such commissioner of assessment, it shall and may be lawful for the court aforesaid, or any one of the justices thereof, on the application of the mayor, aldermen and commonalty of the city of New York as often as such event shall happen, to appoint a discreet and disinterested person, being a citizen of the city of New York, as such commissioner of assessment in the place and stead of such commissioner so dying, resigning or refusing to act, and the surviving or acting commissioners, as the case may be, shall have full power to proceed in the execution of their duties under their appointment until a successor of such commissioner so dying, resigning or refusing to act shall be appointed. It shall be the duty of said commissioners to view the improvement provided for by the terms of this act from One Hundred and Sixth street north to the Harlem river, and all such lands, tenements, hereditaments and premises as they may ultimately include within the area of assessment that may be fixed and determined by them, and shall proceed to determine

Area of Assessment.

the area upon which an assessment shall be imposed sufficient to meet and pay the entire amount of the assessment bonds which may be issued in pursuance of the provisions of section fifteen of this act, together with interest on such bonds to the date of the levying of such assessment, or such portion of said bonds and interest as the said commissioners of assessment shall determine should be paid by assessment. It shall and may be lawful to and for the said commissioners of assessment in their discretion, if they deem it equitable and just so to do, but not otherwise, to assess the whole or any part of the said bonds and interest upon the mayor, aldermen and commonalty of the city of New York. Any area of assessment shall be made so as to include all such lands, tenements, hereditaments and premises as may by said commissioners be deemed to be benefited by the said improvement, and no others; and having fixed such area and the amount of said bonds, and the interest thereon to be paid by assessment, it shall be the duty of the said commissioners to make a just and equitable assessment of the benefit to the respective owners, lessees, parties and persons respectively entitled unto or interested in the lands, tenements, hereditaments and premises included within the said area or* assessment. In each and all and every case and cases where owners or parties interested, or their respective estates and interests are unknown or not fully known to the said commissioners, it shall be sufficient for them to estimate and to set forth and state in their report in general terms the respective sums to be paid, without specifying the names of the estates or interests of such owners, proprietors or parties interested, or either of them. On the coming in of the said report, signed by said commissioners, or a majority of them, the said

Report of Commissioners of Assessment.

*So in the original.

supreme court shall, by order, upon the application of the mayor, aldermen and commonalty of the city of New York, after hearing any matter which may be alleged against the same, either confirm the said report in whole or in part, or refer the same back to the same commissioners for revisal or correction, or to new commissioners to be appointed by the said court to reconsider the subject-matter thereof, and the said commissioners to whom the said report shall be so referred shall return the said report corrected and revised, or a new report to be made by them as aforesaid in the premises, to the said court, without unnecessary delay; and the same, on being so returned, shall be confirmed or again referred back by the said court as justice shall require; and such report, when confirmed by the said court, shall be final and conclusive as well upon the said mayor, aldermen and commonalty of the city of New York as upon the owners, lessees, persons or parties interested therein and entitled to the lands, tenements, hereditaments and premises mentioned in the said report, and also upon all other persons whomsoever.

Copy of Report to be Filed.

§ 17. The said commissioners of assessment, at least thirty days before they present their report to the supreme court, shall deposit a true copy or transcript of the same in the office of the comptroller of the city of New York, for the inspection of whomsoever it may concern, and shall give daily notice, by advertisement in the newspapers mentioned in the sixteenth section of this act, for thirty days after depositing such report as aforesaid, of the said deposit thereof in the said office, and of the day on which such report will be presented to the said court; and any person or persons whose rights may be affected thereby and who may object to the same or any

part thereof, may, within thirty days after the first publication of such notice, set forth their objections to the same in writing to the said commissioners, who shall, after hearing the parties so objecting, thereupon reconsider their said assessment or part or parts thereof so objected to, and in case the same shall appear to them to require correction, and not otherwise, they shall and may correct the same accordingly. The said commissioners shall include in said report the amount of their fees, and all costs and disbursements for expenses, for surveys, maps and other things.

§ 18. In each and every case of the appointment of commissioners under this act, it shall be competent and lawful for any two of such commissioners so appointed as aforesaid, to proceed and to execute and perform the trusts and duties of their said office, and their acts shall be as valid and effectual as the acts of all the commissioners so to be appointed, if they had acted together, would have been; and further, in all cases, the acts, proceedings and decisions of a major part of such of the commissioners as shall be acting in the premises shall be as binding, valid and effectual, as if the said commissioners appointed for such purpose had all concurred and joined therein. The commissioners appointed under and by virtue of this act, who shall enter upon the duties of their appointment, shall each be entitled to receive such compensation as shall be awarded by the court upon the confirmation of their respective reports, not exceeding ten dollars for each day they shall respectively be actually employed in the duties of their appointment, besides all reasonable expenses to be taxed and allowed by said court for maps, surveys, clerk hire and all necessary expenses and disbursements, and the same shall be included in and considered and paid as part of said assessment.

Quorum and Majority.

Compensation.

§ 19. The respective sums so as aforesaid assessed by the said commissioners upon the owners and occupants and parties seized or possessed of or interested in the lands, tenements, hereditaments and premises mentioned in the report of said commissioners, and reported by said commissioners as and for the payment to be made by the parties and persons respectively in the said report mentioned or referred to, and intended as owners and proprietors of or parties interested in lands and premises deemed to be benefited for the benefit and advantage to be derived from the said improvement, shall be a lien or charge on the lands, tenements, hereditaments and premises in the said report mentioned, or upon the estate and interest of the respective owners, lessees, and parties interested in said lands, tenements, hereditaments and premises, for or on account of which the said respective sums shall be so assessed by said commissioners upon the respective owners and proprietors thereof, and parties interested therein; as well the said owners and proprietors thereof and parties interested therein, and also the occupants, and each and every of them, shall, moreover, be respectively liable to pay on demand the respective sum or sums or assessments mentioned in said report at which the respective lands, tenements, hereditaments and premises so owned and occupied by him, her or them, or wherein he, she or they are interested, or at which the owners or proprietors thereof shall be so assessed, to such person or persons as the comptroller of the city of New York shall appoint to receive the same. The said respective sums or assessments, with lawful interest from the date of the confirmation of the report, may be collected, with all costs and charges by action of the said mayor, aldermen and commonalty of the city of New York from and

Assessment Liens.

against the parties assessed, or the owner or owners of the respective lands, tenements, hereditaments and premises whereof or in respect of which the same may be assessed or set forth in the said report of the said commissioners, or from or against any or either of the said parties or owners, without joining any other or others of them, the said parties or owners.

Payment of Bonds and Interest.

§ 20. The moneys collected pursuant to the provisions of sections sixteen, seventeen, eighteen and nineteen of this act shall be set apart, when collected, as a trust fund, to apply to the redemption of the principal and interest of the bonds for the payment of which said assessment shall have been imposed. In the event that the said commissioners of assessment shall have, in pursuance of the provisions of section sixteen of this act, assessed the payment of the whole or any part of said bonds upon the mayor, aldermen and commonalty of the city of New York, the funds to pay the same shall be raised by tax upon the real and personal property subject to taxation in the city and county of New York, and included in the tax levy for the years in which the said bonds shall fall due. The interest on all of the said bonds shall be paid by the city of New York until the same shall fall due, and the amount thereof shall be raised from year to year, by tax upon the real and personal property subject to taxation in the city and county of New York but any interest that may accrue upon the aforesaid trust fund shall be applied in payment of said interest, and from the time that said trust fund shall be established, the balance of the interest only over and above the amount that may be earned from said trust fund shall be raised by taxation as aforesaid.

§ 21. The new bridge over the Harlem river, authorized to be constructed by the provisions of this act, and the approaches to such bridge authorized to be constructed on the north side of the Harlem river in the twenty-third ward, shall be constructed at the sole expense of the New York and Harlem River Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company. The said railroad company shall prepare plans and specifications of said bridge and its approaches on the north side in the twenty-third ward in conformity with this act, and file a copy of such plans and specifications in the office of the comptroller of the city of New York. The said corporation is authorized and empowered to conform the structure of the said bridge to such plans and directions as shall be approved and given by the secretary of war, pursuant to authority conferred upon him by act of congress, and except so far as the structure of said bridge shall be subject to the direction of said secretary of war, the plan therefor, and the approaches thereto on the north side in the twenty-third ward, shall be approved by the board appointed in pursuance of the provisions of this act.

Bridge and Northerly Approaches to be paid for by R. R. Co.'s.

Approval of Sec'y of War.

§ 22. All changes in the railroad necessary to conform the grade thereof on the north side in the twenty-third ward, when elevated as aforesaid, to the new elevation, are hereby authorized and directed, and all grades of the said railroad established by any prior act or acts, or by any contract made by the railroad company owning, or leasing and operating said railroad, or by both, with any public department of the city of New York, or with the city of New York, pursuant to any act of the legislature, are hereby changed to conform to the provisions of this act.

Amending Previous Acts and Contracts.

§ 23. All bridges over the New York and Harlem railroad required to be made by any act or contract pursuant to any act of the legislature of the State of New York which will be interfered with by the change in grade of said railroad required by the provisions of this act, are hereby authorized to be removed except the bridge at One Hundred and Forty-fourth street, which is authorized to be raised as aforesaid, and the obligation to make and continue the same, as imposed by any act or part of any act, or by any contract made pursuant to any act of the legislature of the State of New York, is hereby removed and annulled, anything in any act of the legislature of the State of New York, or in any contract made pursuant to any act of the said legislature of the State of New York, with any public department of the city of New York, or with the city of New York, to the contrary notwithstanding.

City Ordinances.

§ 24. The mayor, aldermen and commonalty of the city of New York, is hereby authorized and directed to pass and adopt such ordinances as may be requisite or necessary to facilitate the said improvement. Said improved structure and bridge shall be exclusively for the uses and purposes of the railroad company, and it shall not be lawful for any person or persons, other than a public officer in the execution of his duty as such, with his agents or assistants, to enter or pass upon or through the same or any portion thereof, on foot or in any other way than in the proper cars of such corporation provided for that purpose, without the consent of said corporation, under a penalty of fifty dollars for each offense. to be recovered by said railroad corporation.

Use of Structure.

Cost of Stations.

§ 25. The cost of the construction of all stations upon said railway, whether provided for in this act or not, shall be borne by the said railroad cor-

porations or either of them, and shall not be included in the estimate to be made by said board of the cost of the proposed improvement from One Hundred and Sixth street to the Harlem river, or the point at which the new bridge over the Harlem river authorized by this act to be constructed, shall commence.

§ 26. Said board shall begin the said improvement and proceed to the completion thereof with reasonable expedition. When completed, the New York and Harlem Railroad Company and its lessee, the New York Central and Hudson River Railroad Company, so long as it remains such lessee, are authorized and directed to run by steam their trains and such trains of other railroad companies as shall have obtained permission therefor voluntarily given by either one of said companies which may be operating said railroad, over the said improvement and the route of the said railroad, and in and upon the depot at Forty-second street, and the switches, turnouts and sidings now authorized by law north of said street; and no trains of other companies, without such permission, shall be run thereon.

Completion of Work and Use of same.

§ 27. The board appointed pursuant to the provisions of this act shall act upon any and all questions by a majority vote of its members.

Majority Vote Necessary.

§ 28. This act shall take effect immediately.

APPENDIX III.

STATEMENT BY THE COURT OF APPEALS OF NEW YORK IN THE LAHR CASE OF THE RULE OF PROPERTY AS ESTABLISHED IN THE STATE OF NEW YORK IN THE STORY CASE.

In Lahr *v.* Met. El. R. Co., 104 N. Y. 268, 288, it was said by Ruger, C. J.:

"We hold that the *Story Case* has definitely determined:

"*First.* That an elevated railroad, in the streets of a city, operated by steam power and constructed as to form, equipments and dimensions like that described in the *Story Case,* is a perversion of the use of the street from the purposes originally designed for it, and is a use which neither the city authorities nor the legislature can legalize or sanction, without providing compensation for the injury inflicted upon the property of abutting owners.

"*Second.* That abutters upon a public street claiming title to their premises by grant from the municipal authorities, which contains a covenant that a street to be laid out in front of such property, shall forever thereafter continue for the free and common passage of, and as public streets and ways for the inhabitants of said city, and all others passing and returning through or by the same, in like manner as the other streets of the same city now are or lawfully ought to be, acquire an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over

such street for the benefit of property situated thereon.

"*Third.* That the ownership of such easement, is an interest in real estate, constituting property within the meaning of that term, as used in the Constitution of the State, and requires compensation to be made therefor, before it can lawfully be taken from its owner, for public use.

"*Fourth.* That the erection of an elevated railroad, the use of which is intended to be permanent, in a public street, and upon which cars are propelled by steam engines, generating gas, steam and smoke, and distributing in the air cinders, dust, ashes and other noxious and deleterious substances, and interrupting the free passage of light and air to and from adjoining premises, constitutes a taking of the easement, and its appropriation by the railroad corporation, rendering it liable to the abutters for the damages occasioned by such taking."

APPENDIX IV.

LEWIS CASE, 162 N. Y. 202.

MARY J. LEWIS, Appellant and Respondent, *v.* THE NEW YORK AND HARLEM RAILROAD COMPANY et al., Respondents and Appellants, Impleaded with the NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant.

Lewis v. *N. Y. & H. R. R. Co.*, 40 App. Div. 343, affirmed.

(Argued January 25, 1900; decided February 27, 1900).

CROSS-APPEALS from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 15, 1899, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This action was brought to recover damages resulting from the operation of the defendants' railroad in front of plaintiff's premises on Park avenue, in the city of New York, and to enjoin the future operation of said railroad.

On the first of February, 1895, the plaintiff became the owner of a lot of land on the easterly side of Park, formerly Fourth, avenue, between 114th and 115th streets, in the city of New York, twenty-five feet wide and eighty feet deep. Upon this lot there is a five-story building known as No. 1613 Park avenue, the ground floor of which is used for stores, and the other floors for apartments. She derived her title to said premises through various mesne conveyances from one Benjamin L. Benson, who is the common source of title of all the parties to the controversy. On the 19th of April, 1897, she commenced this

action against the defendants for an injunction and damages on account of railroad structures erected and maintained in said avenue, which, as she alleged, interfered with access to her premises and prevented light and air from reaching the same.

In 1811 Park avenue was laid out as a street, 100 feet wide, under the name of Fourth avenue, upon a map filed by commissioners appointed pursuant to chapter 115 of the Laws of 1807, but for many years it had no existence except on paper. Said act made the map "in respect to the laying out of streets and roads within the boundaries" specified, final and conclusive, both upon the city and the landowners. It provided for the opening of any street so laid out upon the map whenever the city authorities decided to do so.

On the 19th of November, 1825, by a deed recorded December 6th of the same year, said Benson, who owned a large tract of farming land bounded by 107th and 115th streets and Third and Fourth avenues, conveyed to the city of New York the fee of Fourth avenue as laid out on said map, so far as it extended through his premises, including the portion in front of the lot now owned by the plaintiff, in trust for street purposes, reserving the timber, trees, buildings and improvements standing thereon, and covenanting with all convenient speed to open said avenue over the lands conveyed and make it passable for "horses, carriages, cattle and foot passengers in the same manner and with the same degree of convenience as good country roads are passable." It does not appear that this covenant was ever performed by him, or that the street was actually opened until after 1850.

On the 12th of November, 1828, Benson caused

a map of his tract to be filed in the register's office, upon which various lots were laid out, numbered and represented as lying on the easterly side of Fourth avenue. On the same day, by a deed recorded forthwith, he conveyed to one Watt, a predecessor in title of the plaintiff, the premises now belonging to her, with other lands, described by the lot numbers of said map and as bounded by the easterly exterior line of Fourth avenue.

The New York & Harlem Railroad Company was incorporated by chapter 263 of the Laws of 1831, and authorized "to construct a single or double railroad or way, from any point on the north bounds of Twenty-third street, to any point on the Harlaem River, between the east bounds of the Third Avenue and the west bounds of the Eighth Avenue," but in case the route should be located "in or along any public street or avenue now laid out on the map or plan of the city of New York," the company was required to "leave sufficient space in the said street or avenue on each side of the said railroad for a public highway for carriages, and for a sidewalk for foot passengers." The right was reserved to alter, amend or repeal the act at any time. The location of the route was not to be effective until a map thereof was approved by the common council. That approval was given on the 19th of December, 1831, by a resolution authorizing the company to construct a double or single-track railroad, not exceeding twenty-four feet in width, along Fourth avenue from Twenty-third street to the Harlem river, with the right, however, reserved to the city, in case "the railways or any part thereof shall constitute an obstruction or impediment to the future regulation of the city, or the ordinary use of any street or avenue," of which the city was to be the sole

judge, to require the company to forthwith provide a remedy for the same, and in case of its failure to do so within one month after such requisition, to require it to remove the railway and replace the street in as good condition as it was before the railway was laid down. In case the company neglected to obey, the city was given the right to remove the obstruction from the street and restore it to its former condition at the expense of the company. It was further provided that "the railroad path" should be protected by railings, and that if the railroad should be discontinued "the strip of land to be taken for the said railroad should be thrown open and become a part of the street." This resolution was embodied in a formal agreement, duly executed by the company. On the first of February, 1832, the common council, by resolution, authorized the company "to take possession of the ground owned by the common council over which the line of said railroad is ordered to be constructed, and that they be permitted to use the same" for railroad purposes only.

On the 18th of January, 1832, Benson conveyed to the company a central strip of land twenty-four feet wide, extending from 105th to 116th street, "being part of one of the avenues laid out on the map of the city of New York as the 4th avenue * * * for and during the full period of time" that it should remain a corporation, "and on which they are to construct their railroad and for no other purpose, with the power of sloping their embankments or excavations so much farther beyond the line of said premises * * * as may be necessary to support their work, not, however, extending beyond the width of the avenue," which was then one hundred feet. This deed was recorded August 18th, 1835, but prior thereto the company had constructed a

double-track railroad in the center of the avenue, on a stone viaduct, about twenty-eight feet wide at the base, with sloping walls, which, in front of the premises in question, were ten or twelve feet high.

In 1835 an effort was made to widen Fourth avenue to 140 feet, mainly because of the railroad in the center thereof. After action by the common council, upon the petitions of citizens and landowners interested, it was provided by chapter 274 of the Laws of 1837, entitled "An act to alter the map or plan of the city of New York," that "Fourth Avenue" should "be continued and extended on the said map or plan from 66th street to 68th street," and that "all that part of the Fourth avenue * * * lying between 34th street and the Harlem river shall be widened on the map or plan of the said city by adding thereto, on each side thereof, twenty feet of land, so as to make the whole width of that part of the said avenue 140 feet." The portion so to be widened was declared to be one of the avenues of the city, with the like effect as if it had been laid out under the act of 1807. Said act of 1837 discontinued parts of eight streets, and assumed that Fourth avenue was not yet opened, for it provided that "whenever the said avenues or streets, or any or either of them, shall be opened, the damage and benefit shall be estimated, assessed and paid in like manner as the same would have been done if the said avenues or streets had been originally so extended or continued."

Between 1850 and 1853 Fourth avenue was opened from 38th street to 135th, the additional twenty feet on each side having been condemned and a nominal award of one dollar made to the railroad company, but its possession of the central portion of the street was never disturbed, and the part then occupied by the com-

pany was never used as a public street until after 1892. There is no evidence that any part of the avenue in the vicinity of plaintiff's premises was ever built upon or used by teams until after 1850.

By chapter 702 of the Laws of 1872 said company was "authorized and required to regulate the grade of their railroad in the Fourth Avenue," and to make numerous changes by way of viaducts, bridges and tunnels in order to do away with grade crossings. Four tracks were authorized, and the grade was depressed a part of the way so that the tracks ran through a cut, but in front of the premises now belonging to the plaintiff a viaduct was required, which resulted in the construction of a solid stone embankment 56 feet 4 inches wide and 3 feet high, with a wall on each side extending up 3 feet and 10 inches farther. These changes were made by a board of engineers named in the act, who were required "to execute, direct and superintend the construction of the said improvement," and "take the entire charge and control" thereof. The cost of the improvement was to be paid by the railroad company and the city in equal proportions. The city officers were forbidden to obstruct the work; the municipal legislature was required to pass such ordinances as were necessary to facilitate the same, and the company was "authorized and directed to run" its trains over the structure "when completed."

This improvement was finished about 1873, as the trial court is presumed to have found, and during that year said company leased its railroad in Fourth, now Park avenue, to the New York Central & Hudson River Railroad Company for a term of 401 years, and the latter company has operated the same ever since.

In 1890 an act of Congress required the secretary of war "to cause the low bridges now cross-

ing said Harlem river to be replaced by other bridges at the expense of the owners thereof, as soon as the necessary legislation, if any such legislation be necessary, shall have enabled the change in grade to the approaches of said bridges thus required to be made." (26 U. S. Stat. at Large, 437.) In order to conform to this act no change of grade was required south of 125th street. In 1892 an act was passed, known as chapter 339, "to regulate, improve and enlarge Park Avenue;" "to provide for the passage of intersecting streets under the railroad structure of the New York & Harlem Railroad Company;" "for the elevation of said railroad structure;" "for changing the grade of said railroad;" "for the construction of a new railroad bridge at an increased elevation over the Harlem River. * * * and for other purposes." From the south side of 111th street to the river the railroad tracks were required to be carried on a viaduct of iron consisting of three lines of plate girders, supported by steel columns standing on suitable pedestals of masonry, with proper foundations. The structure was to be so built that all streets from 112th to the Harlem river should be passed over with a clear height of not less than 14 feet above the surface of the pavement. Various cross streets, including those nearest to the plaintiff's property, which did not then cross the railroad, were required to be opened, regulated and paved, and to pass under the viaduct. Three supporting columns were to divide the structure into spans of about sixty-five feet, with one column in the center and another on each side at a distance not exceeding 28 feet. The columns were not to be more than 24 inches through, which was to be their "extreme external diameter above the level of the street pavement." The railroad tracks, four being authorized, were to be carried on a solid, tight, iron floor, and the

drainage water conducted by pipes into sewers. Many other changes were required, during the making of which temporary structures were authorized in the avenue for the operation of the railroad. All the work, including that last named, was to be done by a board appointed by the mayor, which was directed to take the entire charge and control of the improvement, and to execute it in conformity with the act, one-half of the expense to be paid by the companies and the other half by the city, but the amount of the latter was to be assessed upon the property benefited. The defendants were "authorized and directed" to run their trains on the structure "when completed."

Pursuant to this act work was begun in August, 1894. The stone embankment was taken away and the viaduct constructed within the lines of the old structure, at a height above the street of about 35 feet and a width of 56 feet and 2 inches. The effect was to raise the trains high in the air and to remove the former obstruction from the avenue, which is now graded, paved and used as a street, 140 feet wide, with cross streets no longer cut in two. The whole avenue is open to traffic, except where the columns stand, and all the lateral streets, including 114th and 115th, extend across without obstruction. While the permanent structure was in course of erection, provision was made by said board, pursuant to the act, for the running of trains by the erection of temporary trestles on each side of the old stone structure of 1872. These trestles were 3 feet high, about 13 feet 7 inches wide, and the total width of the old structure and the two trestles about 85½ feet. They were built primarily for the operation of trains, and secondarily to aid in erecting the permanent structure. All the work of construction, both temporary and permanent, was done by the board appointed by

the mayor, and neither defendant participated in the erection, or did anything, except in subordination to the board, which had exclusive control. The trains were transferred to the trestles in September, 1894, and were run thereon until February 16th, 1897, when they were removed to the new steel viaduct, upon which they have been operated ever since. The new structure, as compared with the old, confers no additional advantage upon the defendants. Between four and five hundred trains run over this structure every twenty-four hours, some of them in the night time, at from twenty to twenty-five miles an hour. The plaintiff purchased her lot while the work was in progress, and commenced this action shortly after the completion thereof.

The trial judge found that the defendants, by virtue of the various acts above named, the resolutions and action of the city, the Benson deed of January 18th, 1832, the street opening proceedings "commenced in 1850 and consummated in 1853, * * * and all acts of acceptance, user and occupation on the part of the defendant railroad companies, and the lapse of time and the acquiescence of the plaintiff or her predecessors in title, acquired the right, without liability to the plaintiff, to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to August, 1894." He also found that "the rental and fee values of the plaintiff's premises were damaged by the work of constructing said permanent structure, and by the existence of the same prior to said date (when the trains began to run thereon), but neither of the said defendants is liable for such damage. The said permanent structure and the operation of trains thereon are, and since February 16th, 1897, have been, a continuous trespass upon the

plaintiff's easements of light and air, appurtenant to her said premises, and solely in consequence of said trespass, and aside from any other causes, the rental or usable value of said premises was depreciated from said date down to May 9th, 1898, in the sum of $100, below what said rental value would have been during said period, if there had been no change in defendant's said railroad in Park avenue in front of said premises, pursuant to chapter 339 of the Laws of 1892, and the fee value of said premises had been, and was on May 9th, 1898, depreciated in the sum of $750 below what said fee value would have been on said date if there had been no change in defendants' railroad as aforesaid. The said sums awarded as damages are over and above any and all benefits conferred upon said premises by the changes made pursuant to chapter 339 of the Laws of 1892, which said benefits result in part from improved access to said premises afforded by said changes, and in great measure offset the damages to said premises caused by said changes. The said sums awarded as damages are exclusive of any damages that would have been occasioned to plaintiff's premises by the maintenance and use of the defendants' railroad and structures, had there been no change in the same pursuant to chapter 339 of the Laws of 1892, for which last-mentioned damages, if any, the defendants are not responsible either jointly or severally." It was further found that "the existence of the temporary structure in front of plaintiff's premises, during said period, and the operation of trains thereon, deprived the plaintiff to a great extent of the light and air and access to which she was entitled, without any corresponding benefit, and the rental or usable value of her premises was damaged thereby in the sum of $600, which sum

she is entitled to recover, with interest from February 16th, 1897; but the said defendant is liable for the presence and use of said temporary structure only during the time its trains were operated thereon."

The trial court held that the defendants were not liable for the erection, maintenance or use of the old stone structure, or for the erection of the new steel or temporary wooden structures, but that they were liable for the actual use of the temporary trestles and for the net difference in the effect of using the old and the new structures, after taking into account the increased facilities for access. The liability of the defendants was thus limited to damages caused by the presence of the temporary and permanent structures, so long only as they were in actual use by them.

From the usual judgment entered accordingly both parties appealed to the Appellate Division, where the judgment was affirmed, one of the justices dissenting upon the ground that the plaintiff had sustained no permanent damage by reason of the new erection, as the old structure was a greater detriment to her premises than the new. Both parties appealed to this court.

J. C. Bushby and *L. M. Berkeley* for plaintiff, appellant and respondent.

Henry G. Atwater and *J. C. Thomson* for Alice I. Birrell and others, intervening.

Ira A. Place, Samuel E. Williamson and *Alexander S. Lyman* for defendants, respondents and appellants.

VANN, J. The plaintiff claims that the trial court erred in refusing to allow her damages for the effect of the new structures, both temporary and permanent, without considering the effect of

the old structure. The defendants claim that the court erred in awarding any damages, or giving any relief whatever, to the plaintiff, because, as against her, they had the right to erect any railroad structure in the street, of any height, within the lateral lines of the old embankment.

The defendants' appeal rests mainly upon the proposition that, by virtue of the Benson deed to the Harlem Company, in 1832, and possession thereunder for more than twenty years under claim of title exclusive of any other right, the defendants acquired title to the land upon which the steel viaduct now stands (Code Civ. Pro. § 369; *Baker* v. *Oakwood*, 123 N. Y. 16).

The situation, when the Harlem Company entered Fourth avenue and took possession of the strip of twenty-four feet covered by the Benson deed, was as follows: The section had been mapped under the act of 1807, as well as by Benson, and Fourth avenue had been laid down on both maps as one of the streets of the city. Benson had conveyed the entire avenue to the city for street purposes, reserving certain rights, and after thus conveying to the city had assumed to convey said strip to the Harlem Company exclusively for railroad purposes, but the conveyance was effective only as to his reserved rights. After conveying to the city, but before conveying to the company, he had conveyed, by reference to said maps, certain abutting lands to the plaintiff's predecessor in title. The avenue was not opened or built upon, as such, but was a street on paper only. The state and city had given the Harlem road the right to enter the avenue and lay down tracks on said strip, subject to certain drastic conditions, which gave the city supreme control, and to which the company had expressly assented, and, finally, the city had authorized the company "to take possession of the ground owned by the" former and

had ordered the latter to construct its road thereon, with leave to use the street for "the purpose of a railroad and for that purpose only." The situation differs from that considered by us in a late case, as Benson had conveyed the street to the city and the abutting land to plaintiff's predecessor before he conveyed to the company, whereas in that case the first conveyance was to the company itself (*Conabeer* v. *N. Y. C. & H. R. R. R. Co.*, 156 N. Y. 474).

There is no evidence as to the character of the original entry into the street by the Harlem Company, or the nature of its claim when or after entering, except as it may be inferred from the facts above mentioned and the subsequent occupation and use for railroad purposes of a portion of the avenue, which was a street *in posse* only and did not become a street *in esse* until twenty years later. Under these circumstances the entry and occupation by the company must be "deemed to have been under and in subordination to the legal title" of the city. (Code Civ. Pro. §368; Code Pro. §81; 2 R. S. 293, §8.) Occupation must not only be hostile in its inception, but it must continue hostile, and at all times, during the required period of twenty years, challenge the right of the true owner in order to found title by adverse possession upon it. The entry must be strictly adverse to the title of the rightful owner, for if the first possession is by permission it is presumed to so continue until the contrary appears. If the occupation begins with recognition of the real owner's estate it is presumed to be subservient, and that the one making the entry intends to hold honestly and not tortiously. The character of the possession depends on the intention with which entry is made and occupation continued. There is no disseisin until there is occupation

with intention to claim title, and the fact of entry and the *quo animo* fix the character of the possession. The burden of proving all the facts necessary to constitute adverse possession is upon the one who asserts it, for in the absence of such proof possession is presumed to be in subordination to the true title (*Brandt* v. *Ogden*, 1 Johns. 156; *Smith* v. *Burtis*, 6 Johns. 197; *Jackson* v. *Johnson*, 5 Cow. 74; *Jackson* v. *Brink*, 5 Cow. 483; *La Frombois* v. *Jackson*, 8 Cow. 589; *Humbert* v. *Rector, etc., of Trinity Church*, 24 Wend. 587; *St. Vincent Female Orphan Asylum* v. *City of Troy*, 76 N. Y. 108; *Doherty* v. *Matsell*, 119 N. Y. 646; *Kneller* v. *Lang*, 137 N. Y. 589; *DeLancey* v. *Piepgras*, 138 N. Y. 26; *Heller* v. *Cohen*, 154 N. Y. 299, 311; Tyler on Ejectment, 860; Buswell's Lim. & Ad. Poss. 380; Am. & Eng. Encyc. of Law [2nd ed.], 778).

The entry by the Harlem Company was by the express permission of the city, under a resolution which recited that the land entered upon was at the time owned by the city. The occupation was permissive from the outset, and, as there is no adequate evidence to the contrary, is presumed to have so continued ever since. The company recognized the title of the city by assenting to resolutions passed by the common council both before and after it accepted the deed from Benson. There was no open or notorious assertion of title under that deed, and no evidence of intention to claim title thereunder, except the deed itself, which was not recorded until after the railroad was built. There is no evidence that the city had notice, either actual or constructive, of that deed until the condemnation proceedings of 1850, when a nominal award was made to the company for its interest in the fee of the street. By an agreement duly executed under its seal, the company

expressly convenanted that if permitted to occupy Fourth avenue, it would remove its railroad from the street whenever the city required it. It entered under a license and remained under a license. Its unbroken continuity of possession from that day to this has never been accompanied with the assertion of any claim hostile to the city, for its deed from Benson, under the circumstances, is no evidence of a hostile claim, but simply that it had acquired Benson's reserved rights, which cut no figure in this controversy. Possession to be effective must be hostile to the rightful owner, and if the company intended to base a claim upon its deed in hostility to the city, the circumstances required it to make the fact known to the city, as otherwise its possession is presumed to be in accordance with its agreement. (*Treadwell* v. *Inslee*, 120 N. Y. 458.) The city did not know that the company had repudiated its agreement and stood on the Benson deed, exclusive of any other right, if such were the fact. It did not know of the existence of that deed, for the record was no notice, as a landowner is not compelled by the Recording Act to watch the records for conveyances of his own property. To authorize the presumption of a grant, the enjoyment "must not only be uninterrupted for the period of twenty years, but it must be adverse, not by leave or favor, but under a claim or assertion of right, and it must be with the knowledge and acquiescence of the owner." (*Flora* v. *Carbean*, 38 N. Y. 111; *Bedlow* v. *N. Y. F. Dry Dock Co.*, 112 N. Y. 263; *Parker* v. *Foote*, 19 Wend. 313.) When the occupant is in possession under two instruments, one subservient and the other hostile to the true owner, such possession, in the absence of positive notice to the contrary, will be regarded as subservient only, for the law raises a presumption in favor of an honest and against a dishonest

purpose. This disposes of the appeal brought by the defendant, so far as it requires discussion apart from the claim of the plaintiff.

The plaintiff's appeal rests upon the proposition that she is entitled to the same relief that she would have been if there had been no railroad structure in the street prior to the erection of the steel viaduct. It would be sufficient to say in answer to this claim that as she asks aid from a court of equity, she can enforce her claim only so far as it is equitable, in the sense of being just. When she crosses the line of equity and good conscience to ask for compensation on the same basis as if Park avenue had never been a railroad street and seeks to recover damages which she has not suffered, on the ground of an alleged technical right, she must withdraw from a court of equity and seek relief at law. Since she or her predecessors submitted without complaint or question to the erection of two railroad structures in front of her property, each of which stood there for more than twenty years and wholly occupied the central portion of the street to the exclusion of all traffic therefrom, it would not be just to claim the same damages for injury to her easements by the third structure that she could properly have claimed if those easements had not been impaired by the previous structures. She has been awarded all that is equitably her due, which is the net difference, measured in money, between the effect of the old and the new structure, while in actual use, less the benefits conferred by the latter. She has also been granted an injunction to protect her hereafter, unless her permanent damages are paid upon the same basis. A court of equity will give her no further relief.

But we will not stop here, for we wish to place our decision upon grounds equally tenable in

either jurisdiction. While the defendants acquired no right by adverse possession, as against the city, they acquired certain rights by prescription as against the abutting owner.

The leading facts bearing upon the subject may be summarized as follows: The lands embraced within the lines of Fourth avenue, as originally laid out upon the maps of the city and of Benson, were, by various conveyances, resolutions of the common council and acts of the legislature, so devoted to street purposes that they could not lawfully be used for any inconsistent purpose. (*Matter of Vil. of Olean* v. *Steyner*, 133 N. Y. 341, 345; *Lord* v. *Atkins*, 138 N. Y. 184, 191; *Haight* v. *Littlefield*, 147 N. Y. 338, 342.) The easements of light, air and access, so far as they had any practical existence prior to 1853 when the avenue was opened, were encroached upon by the first railroad structure, which, in front of plaintiff's premises, was a solid embankment 28 feet wide at the bottom and 10 or 12 feet high, walled in with stone. From 1853 to 1873, when the first improvement required by statute was made, the avenue was open and used as a street on either side of the railroad structure in the center, which continued to encroach upon the easements of the abutting owners. From 1873, when the embankment was converted into a viaduct 56 feet wide and 7 feet high in front of the *locus in quo* until 1894, when the last improvement required by statute was begun, the same encroachment continued. As to the plaintiff and her grantors there was an open, continuous and exclusive possession and enjoyment by the railroad company of the easements in question to the extent of the user during the periods named.

Prescription rests upon the presumption of a lost deed, after adverse use and enjoyment for twenty years, which has been adopted by the

courts as the prescriptive period from analogy to the Statute of Limitations. (*Woodruff* v. *Paddock*, 130 N. Y. 618, 624; *Snell* v. *Levitt*, 110 N. Y. 595; *Nicholls* v. *Wentworth*, 100 N. Y. 455; *Ward* v. *Warren*, 82 N. Y. 265; *Parker* v. *Foote*, 19 Wend. 309, 312; Goddard on Easements, 90; Washburn on Easements (4th ed.). 123; 19 Am. & Eng. Encyc. of Law, 7; Jones on Easements, §160; Gerard on Titles, 745.) What the primary owner loses by his *laches* the other party gains by continued possession without question of his right. (*Campbell* v. *Holt*, 115 U. S. 620, 623.) The adverse use must be of the same character and duration as the adverse possession required to give title to real estate, which has already been considered. If the presumption as to a lost deed may be rebutted, still it presents a question of fact which, in this case, has been determined in favor of the defendants. The possession of the defendants was not subordinate to the plaintiff's title, nor permissive as to her, but openly hostile and necessarily known to be such, to her and her grantors, who made no objection until 1897. It was exclusive, definite and uninterrupted, for it absolutely excluded all from the part of the avenue occupied by the railroad structures. The obstruction was not out of view or knowledge, but in plain sight of the abutting owners, who, by making no objection, acquiesced in the situation. The question does not arise between the railroads and the city, which had consented in advance to the occupation, but between the railroads and the abutting owners, who had not so consented.

Under these circumstances the old structures had stood in the street so long that the railroads acquired a prescriptive right to have them stand there forever, so far as the plaintiff is concerned. The situation was the same in effect as if one of

her grantors, while he owned her property, had conveyed to the defendants the right to permanently keep the stone viaduct where it stood and to use it indefinitely for railroad purposes. To the extent of the user by the companies the plaintiff, through the acquiescence of herself and her grantors, had parted with her rights when the present structure was erected. She could claim no damages on account of the old structure, so long as it stood there. She could claim no damages on account of any new structure erected in the same place, within the same lines, and for the same purpose, which inflicted no more injury upon her property than the old. She could raise no question except such as she could have raised had she given a deed expressly assenting to the erection of the old structure. (*Conabeer Case, supra.*) Had the new structure been no higher than the old, in front of her property, none of her rights would have been invaded, and she would have been entitled to no relief. These views are not inconsistent with but are in accordance with the principles of a case relied upon by the plaintiff, where the defense of prescriptive right failed because the facts failed, as adverse user was not found to have existed for the requisite period. (*American Bank Note Co.* v. *N. Y. El. R. R. Co.*, 129 N. Y. 252.)

The reason why possession of the same structure was adverse to the plaintiff but not to the city, is that the former never consented to the occupation, except by acquiescence during the prescriptive period, while the latter consented to the occupation in advance, and renewed the consent by subsequent acts at frequent intervals, while the railroad company never gave notice, direct or indirect, that it claimed to occupy under its deed or otherwise than by the consent of the true owner.

Prescriptive rights, however, are measured by the user, and the defendants could make no further encroachment without liability. (*Prentice* v. *Geiger*, 74 N. Y. 341; *Baldwin* v. *Calkins*, 10 Wend. 169; *Bealy* v. *Shaw*, 6 East, 208; *Stiles* v. *Hooker*, 7 Cow. 266). As was said by Judge ANDREWS in *Prentice* v. *Geiger* (*supra*): "The right is supposed to have had its origin in a grant, and the grant being lost, the user is the only evidence of the right granted, and as the presumption of a grant only exists where there has been an adverse, continuous and uninterrupted user, according to the nature of the easement claimed, for the period of twenty years, the prescriptive right is confined to the right as exercised for that period of time." The plaintiff, therefore, was entitled to recover for the additional injury to her property so far as it was caused by the defendants.

We now reach the question whether the defendants were liable for any part of the damages caused by the effect of the steel viaduct while it was in process of construction.

That structure was not erected by the defendants but by the state, as appears from the facts already stated. South of 125th street it gave them no facilities which they did not have before. The stone structure of 1872 did away with grade crossings and gave them four tracks, and this is all they have now. The change of grade north of 125th street, in order to cross the Harlem river at the height required by the general government, has no bearing upon the change of grade south of that point. The defendants are liable for what they did, but not for what the state did. (*Atwater* v. *Trustees, etc.*, 124 N. Y. 602.) The state created a board of experts and required them to make the improvement for the benefit of the public, giving them absolute control with no right on the part of the defendants to let or hinder. The

board made the plans and did the work, letting their own contracts, employing and discharging their own men, without supervision or interference by the companies, which did not and could not set the board in motion, for the want of power, if for no other reason. The change of grade in front of the plaintiff's premises was not only for a public purpose, but was wholly in the interest of the public and not for the benefit of the defendants who had no power to prevent it. They simply paid one-half of the expense by command of the statute, and, hence, under compulsion of law. They are not liable for the acts of the Park avenue board, which was not their agent, but a governmental agency of the state. (*Benner* v. *Atlantic Dredging Co.*, 134 N. Y.. 156, and cases cited on page 162.) Their offer in advance to obey the statute did not affect its compulsive force, for obedience was their duty. As was tersely said in a late case, the railroad company "had no choice left to it. The state intervened and directed that a work, which it had the power to require to be done, should be done, not by the railroad nor even by the city, but by an independent board in the creation of which the defendant had no voice, over whose selection of employees it had no control, with the discharge of whose functions it could not interfere and whose operations it was powerless to prevent." (*N. Y., N. H. & H. R. R.* v. *Baker*, 98 Fed. Rep. 694.)

When the work was completed, if the defendants had not used it, they clearly would have been under no liability to the plaintiff. This is a decisive test, not only as to the permanent structure, but also as to the temporary trestles, which were part of the same scheme of the legislature, acting under general power, as well as that reserved when it incorporated the Harlem Company. They were erected by the same board, in the same way

and under the same authority, but for the double purpose of aiding in the principal work of the state, and at the same time affording temporary relief to the defendants in the operation of their trains. The statute "authorized and directed" the defendants to operate their trains on the structures "when completed." Accordingly they laid their tracks, at first on the trestle work, which they used for a short time, and then on the steel viaduct, which they have used ever since. In thus using the work of the state they doubtless accepted it as their own, but they accepted it as a completed structure, and did not thereby become parties to the process of construction. Their acceptance did not reach back and adopt the previous acts of the state, but the effect was the same as if they had purchased it from the state on the day they commenced to use it.

Thus we strike the time when the liability of the defendants began. When they commenced to use the steel viaduct they started a new trespass upon the rights of the abutting owners. While they had a prescriptive right to use a railroad structure standing in the same place and of the same height as the stone viaduct, which was about 7 feet, they had no right, as against the plaintiff, to use the steel viaduct, which reached upward 35 feet until it was on a level with the windows of her fourth story. The new structure, so far as it stood within the lines of the old, was not a trespass, for it lessened instead of adding to the burden, but so far as it extended above the space which it had to occupy, it was a trespass, for which the defendants have properly been held liable during the time they used it. The trestle work, which stood wholly without the lines of the stone viaduct, was a trespass without mitigation, for it substantially closed the avenue and conferred no benefit whatever upon the adjacent property. As

to that structure, the liability of the defendants was absolute during the period of user.

The permanent structure, however, was not an unmitigated trespass, for upon the surface of the street it was a great improvement upon the stone viaduct, which it displaced. Before the change was made Park avenue was virtually two streets, each 42 feet wide, separated by a solid and impassable embankment 56 feet in width. Now it is 140 feet wide, with no obstruction to traffic except the columns which support the elevated roadbed. Never before could the plaintiff, or her predecessors, cross the street in front of her property, or even cross by the nearest lateral streets. For the first time in the history of the avenue its central portion is open, paved and capable of being used as a street. A substantial benefit was thus conferred, which, in assessing the damages inflicted upon the owner's easements, when no part of his land is taken, should in justice and according to authority be regarded. The basis of assessment is the difference in value of the easements as they now are and as they were with the old, and before the new viaduct was erected. (*Newman* v. *M. E. Ry. Co.*, 118 N. Y. 618, 624; *Bohm* v. *M. E. Ry. Co.*, 129 N. Y. 576, 591; *Sutro* v. *M. Ry. Co.*, 137 N. Y. 593; *Bischoff* v. *N. Y. El. R. R. Co.*, 138 N. Y. 257.) The courts below followed this rule and held the defendants liable for the net difference only.

The claim that the defendants abandoned their prescriptive rights by removing the old structure cannot be sustained. The old structure was not removed by the defendants, but by the state, of its own motion and through an independent agency created by itself. Moreover, the removal of one railroad structure, followed immediately by the erection of another, in the same place and for the same purpose, is no evidence of an intent to

abandon the prescriptive right to have a railroad structure in the street. If the new structure had not been a greater burden than the old the plaintiff would have been entitled to no relief whatever.

The effect of the condemnation proceedings of 1850, which widened the avenue, created no new easements for the benefit of the plaintiff or her predecessors, so far as the original width of the avenue was concerned. This was passed upon in the *Conabeer Case* (*supra*), and requires no discussion.

We have reached the conclusion that the learned trial judge awarded and withheld relief precisely as the law requires, and that his judgment should stand. In reaching this conclusion we have been materially aided by the opinions delivered in the Supreme Court in this and other cases affecting the locality in question, although we have not adopted all of the grounds upon which that learned court proceeded to judgment. (*Taylor* v. *N. Y. & H. R. R. Co.*, 27 App. Div. 190; *Welde* v. *N. Y. & H. R. R. Co.*, 28 App. Div. 379 and 29 Misc. Rep. 13; *Birrell* v. *N. Y. & H. R. R. Co.*, 41 App. Div. 506; *Sander* v. *N. Y. & H. R. R. Co.*, 42 App. Div. 618.)

We have decided the case before us and have not tried to decide other cases, which, although arising in the same section, rest upon different facts, and may be controlled by different principles of law. While we have carefully read the argument presented by learned counsel in behalf of the intervenors, we have limited its effect, so far as we have followed it, to the facts of this case.

The judgment should be affirmed, but as both parties appealed, without costs to either as against the other.

PARKER, Ch. J., BARTLETT, MARTIN, CULLEN and WERNER, JJ., concur; GRAY, J., not sitting.

APPENDIX V.

FRIES CASE, 169 N. Y. 270.

GUSTAV R. FRIES, Respondent, *v.* THE NEW YORK AND HARLEM RAILROAD COMPANY et al., Appellants.

Fries v. *N. Y. & Harlem R. R. Co.*, 57 App. Div. 577, reversed.

(Argued April 19, 1901; decided December 31, 1901.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 16, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Ira A. Place, Samuel E. Williamson and *Alexander S. Lyman* for appellants.

Joseph A. Flannery for respondent.

O'BRIEN, J. The plaintiff is the owner of a three-story frame building on Park avenue, at the southwest corner of 129th Street, in the city of New York. The building contains eight stores fronting on the avenue. This avenue is one hundred and forty feet wide, and the defendants own and maintain a railroad therein, and have under some form and under some arrangement for over sixty years. The plaintiff claims that the railroad has invaded his property rights and is a trespasser upon them. For this trespass the trial court held that the defendants should pay to the plaintiff the sum of five thousand five hundred dollars, past and future damages, or, in default

of such payment, be perpetually enjoined from operating the railroad. This appeal involves an inquiry into the principles upon which the judgment is founded. There is considerable discussion upon the briefs of counsel who have argued the case concerning the effect of a deed to the railroad by the former owner of the plaintiff's property and many other details relating to the right of the railroad to construct and maintain the same in the street in front of the premises in question.

I cannot perceive how these questions can be of much consequence in the disposition of this appeal, since the trial court made an express finding that under this deed various resolutions and acts of the city authorities at various times and under certain statutes referred to, and by lapse of time and the acquiescence of the plaintiff and his predecessors in title, the defendants "acquired the right without liability to the plaintiff to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16th, 1897, as hereinbefore described." Here we have an express finding that on and prior to the date named the defendants were entitled to have and maintain their railroad in the street in question as against the plaintiff and all the world, without let or hindrance from any one, and surely there could be no trespass upon the plaintiff's rights prior to that date. The trial court also found how the railroad had been maintained and operated on and prior to the date mentioned, as follows: "The said railroad prior to February 16th, 1897, was operated along the centre of said Park Avenue in front of the plaintiff's premises in a depressed cut about fourteen feet below the surface of said Park Avenue and sixty-one feet and eight inches wide, which said

railroad cut was bounded on each side by parapet walls of about two feet six inches above the surface of said avenue, which said embankment or viaduct cut off access from one side of said avenue to the other, except at the intersection of 128th and 129th street, at which points there were bridges for vehicles and foot passengers across the said railroad cut." According to this finding the defendants had the right to maintain a railroad in front of the plaintiff's premises that practically cut him off from access to the opposite side of the street except by means of bridges located at intersecting streets. The court also found that subsequent to the date mentioned the manner of operating the railroad was changed, and this is the finding on that subject: "That subsequent to the passage of Chapter 339 of the Laws of 1892, there was commenced within the lines of Park Avenue and in the center thereof the construction of a new viaduct of iron and steel, said structure being about twenty feet high above the surface of Park Avenue and about fifty-nine feet wide. Said work was done under the supervision of the Board for Park Avenue improvement above 106th street, and the said structure was completed and accepted by the defendants on February 16th, 1897. That neither of the defendants are liable for any fee or rental damage which may have been sustained prior to that date; that said permanent structure and the operation of trains thereon are, and since February 16th, 1897, have been a continuous trespass upon plaintiff's easement of light and air appurtenant to his said premises, and solely in consequence of said trespass and aside from any other causes the rental value of said premises was depreciated from said date down to April 2d, 1900, the date of trial, in the sum of $1,500."

It will be seen that the trial court held that the present viaduct and the operation of trains thereon, are, and since the date mentioned, have been, a continuous trespass upon plaintiff's easements of light and air appurtenant to his premises. It also found that this structure was built and the trains operated thereon under and in pursuance of the provisions of chapter 339 of the Laws of 1892. An examination of that statute discloses very clearly a comprehensive scheme on the part of the state for the improvement of Park avenue as a public street by removing the railroad tracks from the cut, closing up the cut and then regulating, grading and paving the street. It was a legislative scheme for the accomplishment of a public improvement. The railroad company had nothing to do with it except to pay such assessment as was imposed upon it by the public authorities to defray the expense of the improvement. Whatever changes were made in the street and in the operation of the railroad were made not by the defendant but by the state in virtue of its general power to improve and regulate public streets. The defendant could not resist the improvement if it would, nor could it refuse when the viaduct was constructed to operate its trains upon it, even if it wanted to, without subjecting itself to a sentence of death at the hands of the state, as all corporations do that refuse to discharge the duties or perform the functions for which they have been created. There is no finding and no claim that the removal of the tracks from the depressed cut to the elevated viaduct was the act of the defendant. On reading the statute it will be seen that it was an act of the state, and how the defendant in one day became a trespasser upon the plaintiff's property rights it is very difficult to conceive. Another case growing out of this

improvement was recently before this court (*Welde* v. *N. Y. & Harlem R. R. Co.*, 168 N. Y. 597), in which the effect of this statute was pointed out. If the viaduct was lawfully constructed and existed in the street under the authority of law, it is impossible to conceive how the defendant could be guilty of a trespass in the operation of its trains upon it. It was constructed for that purpose and the defendant was obliged to use it in the exercise of its franchise and the discharge of the duties due to the public.

The state resolved to displace the railroad in the depressed cut in order to fill up the cut, regulate, pave and grade the whole street, and to this end commanded the railroad to run its cars upon tracks placed upon a viaduct constructed by the state under the statute, and the railroad obeyed. If in doing so it became a tresspasser, it must be because the legislation providing for the change violated some property right of the plaintiff which is protected by the Constitution. In other words, it must be because the statute under which the change was made is unconstitutional. I am unable to perceive any reason why the legislature had not the power to improve the avenue by removing the railroad from the cut to a viaduct, and if the change affected the rental or fee value of the property of an abutting owner having no title to the street, it was but a consequence of the improvement for which the railroad was not responsible.' The law is well settled in this state that where the property of an abutting owner is damaged, or even his easements interfered with in consequence of the work of an improvement in a public street conducted under a lawful authority, he is without remedy or redress, even though no provision for compensation is made in the statute. Whatever detriment the improvement may be to

the abutter in such cases, is held to be *damnum absque injuria. (Radcliff's Executors* v. *Mayor, etc., of Brooklyn*, 4 N. Y. 195; *Talbot* v. *N. Y. & H. R. R. Co.*, 151 id. 155; *Folmsbee* v. *City of Amsterdam*, 142 id. 118; *Rauenstein* v. *N. Y., L. & W. Ry. Co.*, 136 id. 528; *Atwater* v. *Trustees, Vil., Canandaigua*, 124 id. 602; *Benner* v. *Atlantic Dredging Co.*, 134 id. 156.)

The change from the manner of operating the railroad in the depressed cut to an elevated viaduct was made in precise conformity to the mandate of an express statute, and hence even if the railroad made the change itself instead of the state, it would not be liable to the plaintiff. *(Hill* v. *Mayor, etc., of N. Y.*, 139 N. Y. 495; *Bohan* v. *Port Jervis G. L. Co.*, 122 N. Y. 18; *Cogswell* v. *N. Y., N. H. & H. R. R. Co.*, 103 id. 10; *Morton* v. *Mayor, etc., of N. Y.*, 140 id. 212; *D., L. & W. R. R. Co.* v. *City of Buffalo*, 158 id. 266; Id. 478; *Hill* v. *Managers of Met. Asylum Dist.*, L. R. [4 Q. B. Div.] 433; *S. C.* on appeal, 6 App. Cas. 193; *Truman* v. *London, B. & S. C. R'way Co.*, L. R. [25 Ch. Div.] 423). The railroad originally covered nearly 62 feet of the street surface. Now the elevated structure covers only 59 feet above the surface. It would seem to be impossible to sustain the judgment in this case without assailing the constitutional validity of the statute under which this change was made, but I think it would be difficult, in view of the authorities cited, to state any ground upon which it can be questioned. But if this were otherwise it is clear that the plaintiff upon the present record is in no condition to raise any such question. He has not raised it in any form in any court, and it cannot be raised for him now as this court has recently held. *(Dodge* v. *Cornelius*, 168 N. Y. 242.) The plaintiff has not only refused to raise any question concerning the validity of

the statute in this or any other court, but has actually affirmed its validity by setting it out in his complaint and basing his action upon it. So we have the case of a change in the grade of a street which necessitated a change in the location of the railroad tracks, all made under a valid statute, and that alone is said to constitute the alleged trespass. The plaintiff's claim would seem to be answered by the principle laid down in the *Rauenstein* case, the other cases first cited, and in *Ottenot* v. *N. Y., L. & W. Ry. Co.* (119 N. Y. 603). The judgment in this case rests upon what may be called, for want of a better expression, a legal paradox. All that was done that in any way affects the plaintiff's property rights was done, not by the defendant, but by the state. The state engaged in the municipal duty of improving a street in which there was the right to maintain a railroad. It constructed a viaduct in order that the railroad might be operated upon it, and the railroad obeyed. This court has held that the railroad could not resist, which means, of course, that the legislation was valid. (*Lewis* v. *N. Y. & H. R. R. Co.*, 162 N. Y. 226.) On the 15th of February, 1897, it is found that the defendant was rightfully and lawfully operating its railroad in this public street. The next day, as has been decided, it became a trespasser, not only in running trains upon the viaduct, but by maintaining it in the street. It would seem to follow from this that while the state had power to do everything that was done and to compel the railroad to be operated upon the viaduct, yet the railroad was guilty of a trespass in doing so; that is to say, the state compelled the railroad to commit a trespass and the railroad must be held liable for everything done by the state in the exercise of its supreme authority. The conclusion of the learned

trial judge seems to me to involve this method of reasoning, and it would seem that a result which in its last analysis depends upon such arguments must necessarily be unsound.

The elevated railroad cases in this court proceed upon the principle that, as against abutting owners, the railroad was unlawfully in the street, as they had not consented to the construction or conveyed the right to interfere with their easements. But in the case at bar we have an express finding that the defendant had acquired the right as against the plaintiff to use the street for the operation of the railroad. Hence, the principles upon which that mass of litigation proceeded have no application to this case, and so this court has held. (*Conabeer* v. *N. Y. C. & H. R. R. R. Co.*, 156 N. Y. 474.)

On reading the opinions in the court below, both at the trial and on appeal, it will be seen that no reason has been given for the judgment, except that it was supposed to be required by something decided by this court in *Lewis* v. *N. Y. & H. R. R. Co.* (162 N. Y. 202). I do not think that anything was presented, discussed or decided in that case that warrants the judgment in the case at bar. In the first place, the learned judge who gave the opinion in that case was careful to say at its conclusion: "We have decided the case before us, and have not tried to decide other cases, which, although arising in the same section, rest upon different facts and may be controlled by different principles of law." This case does rest upon different facts, comes here in a very different way and is governed by different legal principles, and so is within the saving clause of the opinion. (1) In the first place the legal questions here mentioned were not presented, argued or discussed at all in that case. (2) In that case both parties ap-

pealed from a small judgment, and, hence, neither party was bound by the findings, except so far as there was evidence to support them. The evidence in support of the findings was, therefore, open for discussion here, and it will be seen from the report of the case that the discussion proceeded not so much upon the facts found as upon the proofs given, the decision below not being unanimous. The question of title in the railroad and of adverse possession were the principal matters discussed. Here we are relieved from all discussion of the evidence, since we have specific findings that the plaintiff does not question by appeal or otherwise, and that conclude the defendant as to the facts, and so we have a situation entirely different. (3) It was not found in that case that the railroad was lawfully in the street on the day that the present viaduct was completed, but only that it was lawfully in the street at an earlier date by three years. In the meantime it seems that it was shown in that case that the railroad was using an old viaduct constructed of stone, so far as it appears upon its own authority, while in this case no disturbing element of that kind intervenes, and hence we have to deal only with the single question whether the defendant was guilty of a trespass in the use of a viaduct constructed for that purpose by the state under a statute, and which the defendant was obliged to use, whether it would or not. These considerations mark a material distinction between the *Lewis* case and the one at bar. This case is not embarrassed by any such elements as existed in the case referred to. I have quoted the findings upon which this case comes here, and so long as these findings stand in the case, I am unable to see how there can be any recovery.

There are two other questions in the case of minor importance, but which merit a brief notice.

The plaintiff became the owner of the premises in question in November, 1891. The second floor of the block was devoted to a dancing hall and the third or top floor to lodging rooms. In 1893 the plaintiff leased the dancing hall to a tenant with the use of the lodging rooms for a long term of years, and in 1896 he leased to the same tenant the corner stone and basement. This tenant was in possession, paying the stipulated rent for the premises at the time of the commencement of this action. It will be seen by the findings of the court that the plaintiff was allowed for the diminution in the rental value from February 16th, 1897. The damage to the rental value, if any, therefore, belonged to the tenant and not to the landlord as to that part of the property which was leased. The plaintiff, who was the landlord, lost nothing by the depreciation, because his rental was fixed long before the trespass began. It is only in those cases where the leasing takes place after the trespass or interference with the easements that the landlord is permitted to recover. (*Kernochan* v. *N. Y. El. R. R. Co.*, 128 N. Y. 559; *Hine* v. *N. Y. El. R. R. Co.*, id. 571; *Kearney* v. *Met. El. Ry. Co.*, 129 id. 76; *Witmark* v. *N. Y. El. R. R. Co.*, 149 id. 393).

It must be apparent that at least with respect to the plaintiff's easement of access, it must have been greatly improved by the removal of the railroad from the cut and the grading and paving of the street below the elevated structure. How the change interfered with his easements of light and air it is difficult to conjecture. But assuming that the findings of the court below in that respect are supported by some evidence, it is important to notice the line of proof given as to depreciation in rental and fee value. It appears from the record that the plaintiff called an expert who testified to the course of values in real estate on Madison and

Lexington avenues, and was asked if there was anything which should induce the upward tendency in value in these avenues since 1892, which would have obtained in Park avenue had there been no change in the railroad. The questions in regard to the course of values on both these streets were objected to as incompetent. The objection was overruled and the defendants' counsel excepted. It will be seen that the witness was required to institute a comparison between property on Park avenue and on these other avenues for the purpose of proving damages. Park avenue was concededly subject to a servitude as of right for the use and operation of the railroad. Whatever effect that use or operation had upon the abutting property, the defendants cannot be made liable therefor. The other two avenues mentioned were not subject to any such servitude, and it was, I think, improper to give proof under which the court was required to institute a comparison of values between property on these two avenues which were situated so differently from that upon the avenue where the railroad was rightfully constructed and operated. It may be that in the elevated railroad cases proof of this character was admissible for the reason, as has already been pointed out, that in those cases there was no servitude upon the street as against the abutting owner. If, in the case at bar, the defendant had no right to be in the street as against the abutter, then it may be that the proof would be admissible, but to compare the value of property on two avenues where there was no right to have or maintain a railroad, with property on another avenue where there was such a right, was improper and misleading.

The judgment should be reversed and a new trial granted, costs to abide the event.

MARTIN, J. Although there is a divergence of opinion among the members of the court as to some of the legal questions involved in this case, yet all agree that the statute (L. 1892, Ch. 339) under which the acts complained of were performed is valid, and that the legislature did not transcend its powers in enacting it. It must also be admitted that all the acts of the defendants for which the plaintiff claims they are liable were performed under and in compliance with the direct and express mandate of that statute. That there was no encroachment upon or actual interference with the plaintiff's premises, and that the improvement was made for the benefit of the public and in a proper manner, are likewise practically conceded. Hence, the broad question presented is whether, in the absence of any statute providing for compensation, the defendants are liable for remote or consequential damages in having performed only such acts as were required by the express provisions of the statute upon works of a public nature, where there was neither negligence nor want of skill and no direct invasion of any private property of the plaintiff. We think not. In every civilized community controlled by governmental or municipal laws or regulations, there are many cases where the individual must be subjected to remote or consequential damages or loss to which he must submit without other compensation than the benefit he derives from the social compact. It is well settled by many decisions of this court that acts which are authorized by an express enactment of the legislature and performed in good faith upon a work of a public character, do not render the persons performing them liable for consequential damages unless there is an absence of due care or skill in the execution of the work. In other words, an act done under express authority of law for a public purpose, if

done in a proper manner, and the property of the individual is not taken or encroached upon, will not subject the party doing it to an action for its consequences whatever they may be, unless the law itself provides compensation for injuries of that character. This is the rule where public works for the general welfare are constructed or operated.

Moreover, it seems to us that the principles of law relating to the change of the grade of streets, when lawfully made, are applicable in this case. Here the defendants possessed the right to maintain their railroad and run their trains along and over the street. With their rights, as they then existed, they were content. The sovereign power of the state, however, interfered for a public purpose by a law which expressly and specifically required the grade upon which the railroad was run on this street to be changed, and caused to be erected a steel viaduct upon which the defendants were required to run their trains, so that every act of the defendants of which the plaintiff complains was required by express provision of law. Under these circumstances, it seems quite clear to us that the defendants, as they have not encroached upon the land of the plaintiff, or in any way interfered with it, are not liable for any consequential damages the plaintiff may have sustained by reason of the defendants having obeyed the mandate of the statute. These views find support in the following authorities: *Lansing* v. *Smith* (8 Cow. 146); *Radcliff's Executors* v. *Mayor, etc., of Brooklyn* (4 N. Y. 195); *Wynehamer* v. *People* (13 id. 378, 401); *Davis* v. *Mayor, etc., of N. Y.* (14 id. 506, 522); *Bellinger* v. *N. Y. C. R. R.* (23 id. 42); *Selden* v. *D. & H. C. Co.* (29 id. 634, 642); *Coster* v. *The Mayor, etc., of Albany* (43 id. 399, 415); *Brooklyn Park Comrs.* v. *Armstrong* (45 id. 234, 245); *Kellinger* v. *42nd St. & G. S. F. R. R. Co.*

(50 id. 206); *Losee* v. *Buchanan* (51 id. 476, 480); *St. Peter* v. *Denison* (58 id. 416); *Clemence* v. *City of Auburn* (66 id. 334, 339); *Moore* v. *City of Albany* (98 id. 396, 407); *Uline* v. *N. Y. C. & H. R. R. Co.* (101 id. 98, 107); *Conklin* v. *N. Y., O. & W. Ry. Co.* (102 id. 107); *Cogswell* v. *N. Y., N. H. & H. R. R. Co.* (103 id. 10); *Heiser* v. *Mayor, etc., of N. Y.* (104 id. 68, 72); *Bohan* v. *P. J. G. L. Co.* (122 id. 18, 26); *Atwater* v. *Trustees Vil. of Canandaigua* (124 id. 602, 608); *Reining* v. *N. Y., L. & W. Ry. Co.* (128 id. 157); *Egerer* v. *N. Y. C. & H. R. R. Co.* (130 id. 108); *Benner* v. *A. D. Co.* (134 id. 156); *H. R. T. Co.* v. *W. T. & Ry. Co.* (135 id. 393, 411); *Rauenstein* v. *N. Y., L. & W. Ry. Co.* (136 id. 528); *Hill* v. *Mayor, etc., of N. Y.* (139 id. 495, 501); *Folmsbee* v. *City of Amsterdam* (142 id. 118, 122); *Talbot v. N. Y. & H. R. R. Co.* (151 id. 155); *Sullivan* v. *Dunham* (161 id. 290, 298); *Huffmire* v. *City of Brooklyn* (162 id. 584, 589); *Uppington* v. *City of N. Y.* (165 id. 222, 228).

While in some of the cases cited the question here is not involved or decided, still, even in those cases the rule suggested has been recognized and admitted to be the existing law of this state.

Aside from the case of *Lewis* v. *N. Y. & H. R. R. Co.* (162 N. Y. 202) the only authorities upon which reliance is placed, to sustain a contrary doctrine, are the elevated railroad cases. While those cases have created a liability theretofore unknown, which we think should not be extended, still, it seems to us, they are not only clearly distinguishable from a case like this, but should be distinguished on the merits. In those cases, if correctly understood, the only authority the elevated railroad company had to appropriate the street was the consent of the legislature and the municipal authorities. There, there was no law prescribing what they should do or that required them

to do it. Here, we have a valid statute which expressly and specifically provides what shall be done as to the change of the grade in this street or the erection of the viaduct, provides the manner in which it shall be done, and appoints, or provides for the appointment of, commissioners to carry the statute into effect. It then directs that upon the completion of such viaduct, the defendants shall run their trains over it. Thus in one case we have a mere consent or permission by the public authorities, while in the other we have an express and mandatory statute requiring the defendants to do precisely what they did, and of which the plaintiff now complains. It seems to us that this distinction requires us to apply the general principle applicable to such a case and not the special law that has been created by the decisions in the elevated railroad cases.

While I agree generally with the views expressed by Judge O'BRIEN, I still think that the decision about to be made can be said to be in conflict with the *Lewis* case, and to such extent as it is, the *Lewis* case should be regarded as limited.

CULLEN, J. (dissenting). I dissent from the decision about to be made because I regard it as not only inconsistent with our recent decision in the case of *Lewis* against this defendant (162 N. Y. 202), but as opposed to the prevailing law of this state. Four propositions are settled law with us: 1. That the damage inflicted on an abutting owner by a change in the grade of a street does not constitute a taking of property within the meaning of the Constitution, and that the abutter is not entitled to compensation for such injury unless some statute awards it. (*Radcliff's Exrs.* v. *Mayor, etc., of Brooklyn*, 4 N. Y. 195; *Talbot* v. *N. Y. & Harlem R. R. Co.*, 151 id. 155.) 2. That

the use of the surface of a street or highway for the purpose of a railroad does not invade any property right of an abutting owner who has no title to the soil of the street. (*Kellinger* v. *F. S. St. & G. S. F. R. R. Co.*, 50 N. Y. 206; *Fobes* v. *R., W. & O. R. R. Co.*, 121 id. 505.) 3. That an abutter has an easement in the street for the purposes of light, air and access; that the erection of an elevated structure for the purpose of carrying a railroad thereon is an invasion of such easement and an appropriation of the abutter's property rights, for which, under the Constitution, he must be compensated. (*Story* v. *N. Y. El. R. R. Co.*, 90 N. Y. 122. See all the elevated railroad cases since that decision.) 4. That while the public authorities may raise the grade of a street for street use, or may authorize the construction of a surface railroad on the street, in either case without liability to abutters, they cannot raise the grade of a street for the exclusive use of a railroad without compensating an abutter for the injury inflicted. (*Reining* v. *N. Y., L. & W. Ry. Co.*, 128 N. Y. 157.) The circumstances which distinguish a case which falls under one rule from one which falls under another rule are readily apprehended, and the rules are of comparatively easy application. Whether the difference in circumstance is such as to justify the distinction in principle which prevails in our state is quite another question. I admit that two rules of law, one of which declares that raising the grade of a street and the construction of a bank of solid filling opposite an abutter's premises is *damnum absque injuria*, and the other which holds that the erection of an elevated railroad is an invasion of the property rights of an abutter which cannot be constitutionally effected without compensation, may seem somewhat inconsistent. But I intend not to be led into a discus-

sion of that subject. It is sufficient to say that such is the settled law of the state, and that the rules which I have stated, consistent or not, exist in full force and integrity in our jurisprudence at this very time, and on their authority we are deciding cases at almost every term of court. I may, however, remark in passing that if the attempt is to be made to harmonize the law on this subject, surely it should not be in the direction of extending the doctrine of *Radcliff's Exrs.* v. *Mayor, etc., of Brooklyn.* That case has been repudiated in many jurisdictions, and though firmly imbedded in the law of this state, the hardships occasioned by its application have been so great that in most cases legislative enactments have given abutters the right to compensation for their injuries. If while the legislature can authorize the laying of a surface railroad without compensation to the abutter, it cannot authorize the construction of a viaduct for an elevated railroad unless compensation be made to the abutter, it must be equally without power to transform a surface road into an elevated road without providing for such compensation. It necessarily follows that, notwithstanding the legislature might have authorized the grade of Fourth avenue to be raised to the height of the structure for the erection of which the plaintiff brings this action, without liability to abutters, that structure invades the plaintiff's property rights, an invasion for which he is entitled to compensation. To relieve the defendant from liability for such compensation it must trace its right to maintain the viaduct as against the abutter, not to the act of the legislature alone, but to a grant of some private property easement to which the plaintiff's title is subordinate or to prescription, which is merely the presumption of such a grant.

It is said that the legislature had power to authorize the improvement of Fourth avenue and to direct the railroad company to elevate its tracks. This cannot be doubted. But it could not relieve either the commissioners or the railroad company from paying for any private property taken for the improvement. If I am right in the proposition repeatedly held by this court that an abutter has an easement of light, air and access in a street as against all structures therein except those to be used for strictly street purposes, and as against all improvements save a change in the grade of the street itself, then the situation in no way differs from that which would have been presented had the legislature turned the railroad company off the street altogether and made it construct a new line on adjoining property. In either case the railroad company would be bound to pay for what it took. These propositions were not discussed in the *Lewis* case, but were assumed as settled by the previous decisions of this court and that decision could not have stood on any other foundation. What here has been written, there passed without the saying. In the *Lewis* case the defendant was held not to be answerable in damages until it began running its trains over the structure. This ruling did not proceed on the theory that the construction of the viaduct worked no trespass on the plaintiff's rights, but on the ground that the defendant did not participate in that trespass until it went into possession of the structure and ran its trains thereon. There is no inconsistency between the *Lewis* case and that of *Conabeer* against this defendant (156 N. Y. 474). The same learned judge that wrote in the earlier case concurred in the opinion delivered in the later case. In the *Conabeer* case the trial court found as a matter

of fact that no injury to the plaintiff's easement was occasioned by the new structure. In the *Lewis* case and in the present one the findings of fact are the exact reverse.

It is said that the trial court has found the structure to be lawful and that such finding is binding upon us. The finding is merely one of law and properly construed it is correct. An obstruction in a highway that would otherwise constitute a nuisance may be authorized by the legislature; but, of course, the party creating it would have no right to maintain it as against the owner of the soil of the highway. Yet the maintenance of the obstruction would be properly characterized as lawful, that is to say, as having the authority of law and as not being a nuisance. It is further contended that for the plaintiff to succeed, the statute authorizing this improvement must be held unconstitutional and that as no question of its constitutionality was raised in the trial court none can be raised here. The statute is not unconstitutional and no decision to that effect is necessary to secure the plaintiff's rights. If an act were passed by the legislature authorizing a corporation to construct a bridge across the Hudson river above Waterford, it would be unconstitutional because the Constitution prohibits the enactment of a special law for such purpose. If, however, the act authorized the construction of a bridge at the Highlands (the Constitution permitting special acts for bridges over the Hudson river below Waterford) it would not be rendered unconstitutional by the fact that the company did not own a rood of ground in either of the counties which border on the river at that point. The statute would simply be inoperative until the company acquired the necessary land.

As this is a dissenting opinion, I do not deem it necessary to discuss the extent of the right ac-

quired by the defendant through private grant. It is sufficient to say that it is not greater than that carefully examined and considered in the *Lewis* case, and that it is of the same general character. If my difference with the majority of the court related merely to that subject I should be content to confine myself to the record of my vote. It is against what I consider the broad and far-reaching doctrine of the prevailing opinion that I feel constrained to express the reasons for my dissent.

MARTIN, J., in memorandum concurs with O'BRIEN, J.; PARKER, Ch. J., and LANDON, J., concur with O'BRIEN and MARTIN, JJ.; BARTLETT and VANN, JJ., concur with CULLEN, J.

Judgment reversed, etc.

APPENDIX VI.

KEIRNS CASE, 173 N. Y. 642.

JOHN KEIRNS, Respondent, *v.* THE NEW YORK AND HARLEM RAILROAD COMPANY et al., *Appellants.*

Keirns v. *N. Y. & Harlem R. R. Co.*, 60 App. Div. 630, reversed.
(Argued November 18, 1902; decided February 24, 1903).

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 7, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Ira A. Place, Alexander S. Lyman and *Thomas Emery* for appellants.

Alfred B. Cruikshank, Henry G. Atwater and *John C. Thomson* for respondent.

Per Curiam. Judgment reversed and the complaint dismissed, without costs, upon the authority of *Fries* v. *N. Y. & Harlem R. R. Co.* (169 N. Y. 270), and *Muhlker* v. *N. Y. & Harlem R. R. Co.* (173 N. Y. 549).

VANN, J. (concurring). The plaintiff's property is in the next block to that in which the property of the plaintiff in the *Lewis* case was situated. (*Lewis* v. *N. Y. & Harlem R. R. Co.*, 162 N. Y. 202). The essential facts of the two cases differ in no particular that would prevent a recovery in one unless they would also prevent a recovery in the other. Since the decision of the *Lewis* case, however, the *Fries* case has been before us, in which a new point in the litigation was

discovered by a majority of the court that was not raised by counsel or considered by us in the former case (*Fries* v. *N. Y. & Harlem R. R. Co.*, 169 N. Y. 270).

The *Lewis* case was argued and decided upon the theory that the entry of the railroad company into Park avenue was in subordination to the legal title of the city; that by user for more than twenty years the company obtained by prescription as against the abutting owners the right to maintain a permanent structure within the same limits and at the same height as previous structures, and to the extent of the company's user for twenty years acquired the exclusive right to interfere with the easements of light, air and access; that the railroad company could not be charged with the damages which the easements of the abutting owners suffered from the construction, itself, by a governmental agency, of the last structure, but that when the defendants used it they became liable from that time for such damages as the easements suffered from such user to the extent of the increased height of the third structure, after deducting the benefits received from increased facility of access.

On the other hand, the *Fries* case was decided upon the theory that, as against the abutting owner with no title to the avenue, the state had the right to require the grade upon which the railroad was run to be changed; to cause to be erected a steel viaduct, and to compel the defendants to run their trains thereon, and in the absence of any statute providing for compensation, that they were not liable for remote or consequential damages sustained by the abutting owners.

This point, although radical, was entirely new, and had it been raised in the *Lewis* case might have resulted in a reversal instead of an affirmance. While the judgment of the court in that

case was by the unanimous vote of all the judges who sat, and the judgment in the *Fries* case was by a bare majority, and while I regret the result reached in the latter as amounting to the confiscation of property belonging to abutting owners and a gift thereof to railroad corporations, I now yield to it as establishing the law of the state, since the principle upon which it rests has been sanctioned and applied in another case by this court. (*Muhlker* v. *N. Y. & Harlem R. R. Co.*, 173 N. Y. 549).

I concurred in the dissenting opinion of Judge CULLEN in the *Fries* case and should have concurred in that of Judge Bartlett in the *Muhlker* case had I sat when it was argued, but I regard the question as now settled, and by the rule of *stare decisis* I am compelled to vote for reversal.

PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN and WERNER, JJ. (and VANN, J., in memorandum), concur; GRAY, J., not sitting.

Judgment reversed, etc.

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Supreme Court of the United States.

HENRY MUHLKER,
Original Plaintiff,
and
Plaintiff in Error,

against

THE NEW YORK AND HARLEM RAILROAD COMPANY, AND THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Original Defendants,
and
Defendants in Error.

99

Memorandum in Opposition to Motion.

The application for leave to file an additional brief should be denied for the following reasons:

I.

The argument of this case was concluded on December 13, 1904. No suggestion was then made, on the part of either court or counsel, that further briefs were desirable. Since then 21 days have elapsed. It may be that the consideration of the case by the court has been closed. After this lapse of time it would seem to be too late to re-open the argument.

II.

A copy of our brief was served upon the opposing counsel on November 23, 1904. Their brief was served upon us on December 3, 1904. In preparing

their brief, they had ours before them, and were thus enabled to reply to it. We have had no opportunity to answer them, save upon the oral argument, when the position of the parties was equal. Thus they have had in reply two chances to our one. They now seek still another chance. We respectfully submit that it should not be granted.

III.

Since the argument of this case, the opposing counsel have discovered that the ground of the decision of the Court of Appeals was totally different from what that court says it was. The learned counsel now claim that the real ground of the decision was a determination that the plaintiff's easements in Fourth Avenue had not been taken or trespassed upon by the defendants, although the trial judge found that they had been. Neither in the opinion nor in the judgment of the Court of Appeals is there a single syllable supporting this theory. On the contrary, the opinion (Record, p. 170), speaks in two places of the "destruction" of these easements by the erection of the viaduct. In the face of this plain statement that the plaintiff's property rights have been *destroyed*, it is purely fanciful to argue that what the court really meant, was, that there was no evidence to show that these property rights had been *trespassed upon*.

The Court of Appeals has nothing to do with evidence, except to answer the sole question whether there is *any* evidence to support a given finding.

Amherst College *v.* Ritch, 151 N. Y. 282, 320.

Ostrom *v.* Greene, 161 N. Y. 353, 357.

If there is *any* evidence, the discussion in that court is terminated.

Was there *any* evidence to support the seventh finding?

In the State of New York, if an abutting owner has easements in the street, and if there is an elevated railroad in front of his premises, this constitutes a trespass upon and a taking of his property (see cases on p. 45 of our brief).

Hence to support the seventh finding, it is only necessary to show (1) that the plaintiff has easements in and over the strip of land constituting Fourth Avenue, and (2) that the defendant operates an elevated railroad in said avenue. The latter proposition is undisputed. The former is equally undisputed. The existence of the easements was found by the court (Record, p. 23), and we do not understand that the finding is questioned. The easements came into being through the dedication and acceptance of Fourth Avenue, and through the filing of maps representing said avenue and the making of conveyances with reference to those maps. These acts all antedated the very existence of the defendants. By these acts the easements were created and attached as appurtenances to the plaintiff's lot. This lot was the dominant tenement and the strip of land constituting Fourth Avenue, was the servient tenement. The easements have never been lost. They still exist, except to the extent that they have been "destroyed" by the viaduct in question.

Thus it appears that both the elements constituting the seventh finding were supported by evidence which was uncontradicted. How, then, could the Court of Appeals have held that there was not *any* evidence to support this finding?

The motion should be denied.

Respectfully submitted,

J. C. BUSHBY,
L. M. BERKELEY,
Attorneys for Plaintiff in Error.

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Supreme Court of the United States.

Office Supreme Court U. S.
FILED
JAN 10 1905
JAMES H. McKENNEY, Clerk.

HENRY MUHLKER,
Original Plaintiff,
and
Plaintiff in Error,

against

THE NEW YORK AND HARLEM RAILROAD COMPANY AND THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Original Defendants,
and
Defendants in Error.

Reply to Defendants Supplemental Brief (Filed after the Argument).

No. 99.

I.

1. The defendants in error concede that the elevated railroad decisions are in full force and effect in the State of New York. That is to say, it is a general rule of property in the State of New York, that abutting owners have easements of access, light, and air in the streets, which constitute interests in real estate, and which cannot lawfully be taken for public use without compensation. (See plaintiff's original brief, Appendix, p. 74.)

2. The facts found in this case show that the plaintiff in error had these easements in the street known as Park or Fourth Avenue.

First finding of fact: "That the plaintiff has, and during the periods of his ownership, as aforesaid, had, as appurtenant to his said lot and building, certain easements of light, air, and access in and over said Park Avenue in front of said premises." (Record, pp. 22-3.)

Seventh finding of fact: "That the said permanent structure and the operation by said defendant * * are and have been a continuous trespass upon the plaintiff's easements of light and air appurtenant to his said premises." (Record, p. 25.)

Second clause of judgment: "That in case the said defendants shall, at least five days before the said injunction shall become operative, tender * * * a form of conveyance and release to said defendants of the plaintiff's easements of light, air and access appurtenant to said premises, taken by the maintenance and use of defendants' said permanent elevated railroad structure, as the same is now maintained and used; * * * then the said injunction shall not in any manner become operative." (Record, p. 29.)

3. The Court of Appeals, far from reversing or questioning the possession of these easements by this plaintiff, based their reasoning upon the express assumption of the facts thus found. They say: "Undoubtedly the state had also the power to provide in the act for compensation to abutting owners, and to apportion the expense incurred in the acquisition of *the easements destroyed* upon the defendant and the city of New York * * * But that it possessed the power to improve the street, as it did, for the benefit of the public, in the manner that it did, compelling abutting owners to bear so much of the burden of the improvement as resulted from the *partial destruction of their easements of air, light and access*, we have no doubt." (Record, p. 170.)

4. The consideration of this case must, therefore, rest upon the firm foundation of established fact, that the plaintiff in error had, under the settled law of New York, an interest in the strip of land known as Park or Fourth Avenue, which under a statute of the state has been taken from him without compensation, and which could not be lawfully taken without compensation, unless

some good reason is shown to take his case out of the general rule and make lawful what would ordinarily be a violation of constitutional right.

II.

1. The justification for this action, given by the defendants in their supplemental brief, is, that the defendant railroad companies had acquired certain rights in Fourth Avenue. They concede, in effect, that, except as the railroad companies had prior to the state statute of 1892 acquired specific property rights in Fourth Avenue which justified them in operating an elevated railroad before the plaintiff's premises, there is no justification.

2. What rights had the defendant railroad companies acquired?

(a) There is no pretense that they had acquired *title* to this strip of land. The land on which the railroad runs, was conveyed to the city before the defendant companies came into existence, in trust, to be held for street uses; and there is no pretense that the city has ever parted with the title.

(b) The railroad company entered upon the land and laid down its road under the express consent of the trustee, embodied in a formal agreement, by which its occupation was made subordinate to the uses of the street, and by which that occupation was to cease and the railroad was to be removed if the city found that when the street was graded, the railroad interfered with the use of the street. (Record, p. 117.)

(c) As between the city, which owns the street as trustee, and the railroad company, the railroad is there upon sufferance.

(d) In the condemnation proceedings of 1850-3 the strip of land occupied by the railroad was included, and any possible question set at rest by its condemnation for street purposes, on nominal compensation to the railroad company.

8. The rights of the railroad company in Park Avenue are, therefore, nothing but an easement enjoyed by consent of our trustee, the city, originally deemed to be consistent with the trust upon which the street was held, subject to agreement for removal, if it should ever be found inconsistent with that trust.

4 The court below held that the railroad company had enjoyed this particular easement so long without objection by the abutting owner, that the abutting owner had lost the right to object, and that as against him the railroad was entitled to continue to run as it had been running, on and below the surface of the street. That is the whole of the railroad company's right in the street.

5. The defendants' contention, therefore, is, in effect, that our failure to prevent a use of the street permitted by our trustee, and which did not take away our easements of light and air, gave the railroad company a right to make an entirely different use of the street, which does take away those easements of light and air. This is contrary to established and familiar law. "The right acquired by prescription is commensurate with the right enjoyed. The extent of the enjoyment measures the extent of the right. The right is supposed to have had its origin in a grant, and the grant being lost, the user is the only evidence of the right granted, and as the presumption of a grant only exists where there has been an adverse, continuous and uninterrupted user, according to the nature of the easement claimed, for the period of twenty years, the prescriptive right is confined to the right as exercised for that period of time."

Prentice *v.* Geiger, 74 N. Y. 341, 347.

6. No justification for the elevated railroad structure is, therefore, to be found in any rights acquired by the railroad company itself.

III.

The Court of Appeals has taken no such position as that taken by the defendants and considered above. That court based its attempt to justify the destruction of our easements not upon any rights which the railroad company had acquired, but upon a *public right* to improve the street for the general use of the public by securing the removal of the railroad tracks from the surface of the street and from the cut in the center of the street, through which the railroad ran at some points; and they say that as the removal of the railroad from the surface and the cut is a benefit to the general public, they are justified in authorizing the railroad, in lieu of its former occupancy of the surface, to occupy an elevated road in front of our premises which destroys our easements. They say, in many different forms of expression, that the public benefit which would be secured by getting the railroad off the street, justifies putting this structure above the street and giving the exclusive use of it to the railroad company in lieu of the railroad company's former occupancy of the surface. (Record, pp. 163 *et seq.*)

IV.

We thus come back to what is the real and vital question in the case. Could the state, in order to secure the consent of the railroad company to the removal of its tracks from the surface of the street, compensate it by giving it authority to operate its elevated structure in front of our premises without compensation for the easements which it destroyed?

We submit that it could not. It is not disputed that we owned the easements described in the findings and in the opinion of the Court of Appeals; that the executed contracts, which created

the trust upon which the street was held, protected us against any structure in the street inconsistent with street uses, except as the railroad company may have acquired rights on the surface and below the surface; that no structure which is inconsistent with such street, can be authorized by the state without impairing the obligation of those contracts; that the elevated structure, the exclusive use of which is conferred upon these railroad companies by the state, is inconsistent with street uses, and destroys the easements protected by those contracts. We submit that the constitution must prevail, and that this inconsistent use without compensation must be condemned, whatever were the motives which led to the attempt to authorize it.

An analysis of the transaction discloses two separate acts by the state.

(1) The first was the removal of the railroad from the surface and the cut. This the state had the undoubted authority to accomplish, either through the reserved rights of the city in the contract under which the railroad company laid down its tracks, or upon making compensation to the railroad company. If this were accomplished upon making compensation, the burden would have fallen upon the general body of the tax-payers, or would have been spread by assessment upon all the property owners benefited by the removal.

(2) The other act done by the state was the grant to the railroad company, by way of compensation, of authority to maintain, operate, and exclusively enjoy its elevated railroad structure inconsistent with the uses of the street. That compensation is made at our expense by depriving us of the obligation of the contracts to which we are entitled, and by the destruction of our property rights. The state cannot lawfully purchase a benefit by thus authorizing the destruction of our rights.

The true rule to be applied to test the validity of state action in such a case is the rule to be found in the terms of the trust upon which the street is held. Whatever is consistent with the terms of that trust, i. e., consistent with street uses, the state may authorize, however injurious it may be to abutting owners. Whatever is inconsistent with those street uses, as this elevated structure is inconsistent, the state is precluded from authorizing, except upon making compensation for the property taken.

Respectfully submitted,

ELIHU ROOT,
J. C. BUSHBY,
L. M. BERKELEY,
Of Counsel for Plaintiff in Error.

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Supreme Court of the United States

OCTOBER TERM, 1903.

Supreme Court U.S.
FILED
OCT 12 1903
JAMES H. McKENNEY,
Clerk

HENRY MUHLKER,
Original Plaintiff, and Plaintiff in Error,

AGAINST

THE NEW YORK AND HARLEM RAILROAD COMPANY AND THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Original Defendants, and Defendants in Error.

No. 9

Error to the Supreme Court of New York.

Memoranda on behalf of Defendants in Error in response to Motion to Advance.

IRA A. PLACE,
Attorney for Defendants in Error,
Room 417, Grand Central Station,
Borough of Manhattan,
New York City, N. Y.

THOMAS EMERY,
Of Counsel for Defendants in Error.

Supreme Court of the United States.

OCTOBER TERM, 1903.

HENRY MUHLKER,
Original Plaintiff
and Plaintiff in Error.

against

THE NEW YORK AND HARLEM RAILROAD COMPANY and THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Original Defendants
and Defendants in Error.

No.

Error to the Supreme Court of New York.

MEMORANDA ON BEHALF OF DEFENDANTS IN ERROR IN RESPONSE TO MOTION TO ADVANCE.

The defendants in error appear in response to this "Motion to Advance," mainly for the purpose of having the Court's consideration of it based upon an approximately accurate presentation of the facts pertinent to it, rather than by way of resistance to the granting of the motion.

The view of the counsel for defendants in error is that the facts required by Rule 26 upon which to found such a motion are so conspicuously absent from this application as to suggest inquiry whether the real purpose of the application is not something other than the avowed one.

Such inquiry is further prompted by the marked departure from fairness in the purported statement of the fundamental facts which the case involves, apart from as well as including those which are involved in the consideration of the motion.

If and so far as the statements of paragraphs one to five of the motion papers tend to establish as grounds for the granting of this motion the liabilities of parties to incur or be subjected to costs and expenses in the trial of other cases during pendency of this case in this Court, they are shorn of all force and effect by the paragraph at the foot of page 6 of the motion papers, showing that by order of the Court and agreements of the parties proceedings therein have been stayed to await the disposition of this case in this Court.

Obviously, paragraph "VI." of the reasons for the application presents nothing pertinent to the considerations which this motion involves, as there is practically nothing in common in this case and the proceeding there referred to.

Plaintiff's "Satement of the Matter Involved" is in such form as to carry the inference that this case is altogether like unto the elevated railroad cases therein referred to.

Those cases had relation to the liability of the railroad companies for building, maintaining and operating their elevated railroads in streets theretofore opened and existing entirely free of and unencumbered by any railroad right or burden whatsoever.

The obvious and radical difference between those cases and these Park Avenue cases constitutes the grounds upon which the State courts have held the latter governed by other and different rules of law.

Plaintiff in error, having interposed this motion without waiting for the printing of the case in the Court, proceeds to state the case in general terms, without reference to the

record, in such wise as to impute to it practically identity of character with the ordinary elevated railroad cases.

Presuming that the Court will not dispose of this motion until the case in this Court has been printed, and that the case when printed will show the original pagings, we beg to very briefly present the case, and for that purpose to refer to the former numbering of the pages of the record.

Chapter 115 of N. Y. Laws of 1807 provided for the making of a map or plan of proposed streets and avenues in the upper or northerly portion of the City of New York and in and by sections 9 to 11 thereof provided for acquirement of title by the City as, from time to time, it might determine to open any or either of such streets or avenues (page 57).

In pursuance of this Act such map or plan of the City was made and filed in April, 1811 (page 108; Defts.' Ex. 1).

By Chapter 263, N. Y. Laws of 1831, The New York and Harlem Railroad Company was incorporated, with authority to build a railroad from Twenty-third Street to the Harlem River, the location thereof not to be final until approved by the Common Council of the City, and not to occupy the ground within any street or avenue as shown upon the map or plan of the City, whether opened or unopened, unless consented to by the City (page 81).

In August, 1831, the railroad was located with its centre line coincident with the centre line of the Fourth Avenue, then unopened, as shown upon the city map (Page 110; Defts.' Ex., 2).

This location thereof was consented to by the city, and that consent and the terms and conditions thereof evidenced by agreement in writing of date January 9, 1832, (page 116).

By their respective deeds of date January 18, 1832, Peter Poillon purported to convey north of the centre line of the old Harlem Road, and Benjamin L. Benson pur-

ported to convey south of that line, to The New York and Harlem Railroad Company the centre 24 feet, with the right to occupy with their embankments or excavations the entire width, 100 feet, of the Fourth Avenue, as laid out on the said city map (pages 83–87, and page 112, Deft's. Ex. 3).

By reason of the existence of the railroad in this avenue the city map was changed by Chapter 274 N. Y. Laws of 1837 by adding twenty feet upon either side of the Fourth Avenue (page 81).

By proceedings instituted in 1850 and consummated in or about 1853, the city assumed to acquire title to the ground within the lines of, and to open Fourth Avenue from 38th Street to the Harlem River, under and subject unto all of the laws, ordinances, agreements and consents relating thereto, and thus subject to the right of The New York and Harlem Railroad Company to maintain and operate its railroad within the bounds thereof (pages 57, 58, 112).

The railroad at this point was substantially at a level with the natural surface of the land, consisted of two tracks, and was thus maintained and operated from in or about 1835 to and until after 1872 (pages 78, 79, 114).

Under authority of Chapter 702 N. Y., Laws of 1872, the railroad was depressed and two additional permanent tracks were laid, the change of grade, and also the relation of the grade of the avenue to the former, and to the newly established grade of the railroad, being indicated by Defendants' Exhibit 5; and, the character of the 1872 structure is indicated by the dotted lines on Defendants' Exhibit 8, (pages 114, 124).

Chapters 339, N. Y. Laws of 1892, and 548, N. Y. Laws of 1894, were put in evidence by plaintiff (page 57), and by defendants (page 81), each without objection by the adverse party.

The change of railroad structure under authority of these

Acts was made by the State Board which the Act of 1892 provided for, and the character of that change thereof and the fact that the exterior lines of the present structure are within the exterior lines of the former structure, are shown by Defendants' Exhibit 8 (opposite page 125), the accuracy whereof is testified to (page 95) and in no wise disputed, and the reception of the map in evidence not objected to.

The ground within these lines was, prior to the change under the Act of 1892, devoted to and used for railroad purposes exclusively, and the public had no access across it either directly in front of plaintiff's premises nor at 115th Street, upon which plaintiff's premises corner; the public highway really consisted of two streets, one on each side of the old structure (pages 77, 88). Now, the avenue and 115th Street are open thoroughfares affording free access across every portion thereof (page 88 and black lines on Defts.' Ex. 8, opposite page 125).

Thus the contrast presented by the elevated railroad cases on the one hand and these Park Avenue cases on the other hand, is that the elevated railroads there in question were built upon, occupied and used for their purposes ground and space theretofore devoted exclusively to general public highway street purposes, with abutters' easements naturally and characteristically incident to such free and open street, and that without shadow of title or right as against such abutting owners; while this railroad is built, maintained and operated upon and over ground which was, prior to and until the changes complained of, and but for the Act of 1892 would still be exclusively devoted to, occupied by and used for railroad purposes.

Plaintiff in and by his complaint invoked adjudication upon the rightfulness of that devotion, occupancy and use, as maintained prior to the changes under the Act of 1892, by alleging the fact and claiming injunction and damage in respect thereof (pages 4–6), and the learned

trial Judge found against plaintiff in respect thereof, to wit:

> "That the said sums awarded as damages are exclusive of the damages that would have been occasioned to plaintiff's premises by the maintenance and use of the defendants' railroad and structures had there been no change in the same pursuant to Chapter 339 of the Laws of 1892, for which last-mentioned damages the defendants are not liable either jointly or severally" (page 26).

The practical effect of this is in no respect nullified or diminished by the hypothesis that this land thus rightfully and lawfully occupied and used exclusively by and for the railroad, was nevertheless, in some barren ideal sense, a part of the street.

For all practical purposes, whatsoever street right, and thereto incident abutter's easement right, now extend upon and over this centre strip of land, theretofore rightfully occupied and used exclusively by and for the railroad, whereby the surface thereof is now devoted to street uses, subject to the right of the overhead railroad, are thus extended thereon and thereover by virtue of the Act of 1892, and the carrying into effect of its provisions.

The finding that the company had the right to thus maintain and operate its road, as it did prior to 1897, can but be deemed based upon the facts which the case presents as the foundation of such right.

This is but saying that this finding of the trial Court, and the legal effect thereof, are to be considered in the light of the history of the avenue and railroad which the case presents, and not as a mere abstract proposition apart from the case in and upon which the finding is made.

Whether the railroad was upon grounds which were in legal effect or in some sense a part of the street, or upon what might more properly be termed the railroad company's grounds between two streets, in either case the Act

of 1892 constituted the regulation of both, for, and whereby was effected the enlargement and improvement of the street for public travel.

The Act dealt with a railroad rightfully so maintained and used as to exclude the street and its uses and incidents from all of the ground upon and over which the overhead railroad structure is now maintained and used, and by the means therein prescribed opened to and extended upon and over the surface thereof the public highway and thereto incident easement rights, all qualified and restricted by the right of maintenance and operation of the railroad as therein directed.

If, and so far as if all, the carrying into effect of the provisions of the Act might have been found to result in the taking by the railroad company of any private property, the Act does not deny or refuse, or purport to deny or refuse, remedy adequate to such exigency, and plaintiff has not questioned and cannot successfully question the adequacy of remedy in respect of such exigency provided by State laws applicable thereto now in force.

If in view of and consequent upon the finding and conclusion of the trial Court that this strip of land was rightfully occupied by and used for the railroad, to the exclusion of all other uses, prior to and until the making of the changes complained of, the Court of Appeals concluded and adjudged that defendants could not and did not become trespassers by yielding obedience to the command of the State in operating their trains upon the elevated structure erected therefor upon and over the same land, and that the damage, if any, thereby occasioned to plaintiff, was governed by the doctrine of *damnum absque injuria*, such determination did not involve or embrace any question as to the invalidity of the Act of 1892 by reason of its failure to provide compensation, but, on the contrary, rendered any such inquiry mere dictum, because the case was judicially disposed of before reaching

that inquiry, and upon grounds which rendered that inquiry extra-judicial.

Illustrative of this is the language of Judge O'Brien in the *Fries* case (169 N. Y., 270) at page 278:

> "On the 15th of February, 1897, it is found that the defendant was rightfully and lawfully operating its railroad in this public street. The next day, as has been decided, it became a trespasser, not only in running trains upon the viaduct, but by maintaining it in the street. It would seem to follow from this that while the State had power to do everything that was done and to compel the railroad to be operated upon the viaduct, yet the railroad was guilty of a trespass in doing so; that is to say, the State compelled the railroad to commit a trespass and the railroad must be held liable for everything done by the State in the exercise of its supreme authority. The conclusion of the learned trial Judge seems to me to involve this method of reasoning, and it would seem that a result which in its last analysis depends upon such arguments must necessarily be unsound.
>
> The elevated railroad cases in this Court proceed upon the principle that, as against abutting owners, the railroad was unlawfully in the street, as they had not consented to the construction or conveyed the right to interfere with their easements. But in the case at bar we have an express finding that the defendant had acquired the right as against the plaintiff to use the street for the operation of the railroad. Hence, the principles upon which that mass of litigation proceeded have no application to this case, and so this Court has held (Conabeer *vs.* N. Y. C. & H. R. R.R. Co., 156 N. Y., 474)."

The gist of the matter ruled upon by the Court, and the supposed error therein, are succinctly stated in the dissenting opinion of Judge Bartlett in the *Muhlker* case (173 N. Y., 560), as follows:

> "If it be true that the defendants have no legal right, by reason of grant or prescription, to erect this steel viaduct to the height of 31 feet in front of the

premises in question, the effect of the Act of 1892 is simply, as in the elevated railroad cases, to authorize the construction of this viaduct structure in the avenue, subject to the rights of abutting owners, to the extent that their easements of light, air and access have been invaded.

The mere fact that the act does not provide for compensation has no controlling effect. The legislative sanction to construct what would otherwise be a nuisance in a public street does not imply the power to take the easements of abutting owners, which are property, without compensation.

The fundamental error in the *Fries* case is the assumption that the doctrine of *damnum absque injuria* is applicable."

Notwithstanding the guise in which plaintiff presents it, the fact is nevertheless obvious that what the necessities of plaintiff's case involve, and what plaintiff invokes, is, that this Court review the determination of the State Court based upon all the laws, ordinances, grants, agreements, consents and users whereon the rights of the parties are founded, and thereupon determine that the damage which the State Court had adjudged is not occasioned or accompanied by anything which the law esteems an injury, is, indeed, occasioned or accompanied by actionable injury, and thereby evolve a subject matter to which the inhibitions of the Federal Constitution may be applied.

Respectfully submitted,

IRA A. PLACE,
Attorney for Defendants-in-Error.

THOMAS EMERY,
Of Counsel for Defendants-in-Error.

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Supreme Court of the United States.

HENRY MUHLKER,
Plaintiff in Error,

against

THE NEW YORK AND HARLEM RAILROAD COMPANY and THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Defendants in Error.

October Term, 1904. No. 99.

BRIEF FOR DEFENDANTS IN ERROR.

Statement of Facts.

This is a proceeding by writ of error to the Supreme Court of the State of New York (p. 100), allowed by his Honor Chief Judge Alton B. Parker (p. 101), to review a final judgment of and rendered and entered by that Court, at a Special Term thereof, dated March 5, 1903 (p. 75), upon and in conformity with the remittitur of the Court of Appeals (p. 1), dismissing upon the merits the complaint of the plaintiff in and by which he prayed an injunction alternative to compensation for and in respect of the maintenance and use of the permanent elevated viaduct structure and its appurtenances in Park Avenue, New York City, erected by the Board for the Park Avenue Improvement above 106th Street, under the provisions of Chapter 339 of the Laws of 1892, and amending acts, in front of the described premises of the plaintiff, plaintiff in error.

COMPLAINT.

The action was commenced January 7, 1897 (p. 3), and plaintiff Muhlker, in and by his amended complaint therein (pp. 4, 5), alleged ownership of therein described premises abutting upon Park avenue; that the avenue is a public street and he, as appurtenant to his said premises, has rights and easements therein; that defendant Harlem Company is the owner and Central Company is and since April, 1873, has been the lessee of the described railroad and structures; that for more than six years past the railroad has been maintained in the avenue in a depression or cut with ma-

sonry walls extending many feet above the surface of the avenue, and operated for the benefit of both defendants; that in or about April, 1893, defendants commenced the erection of the described elevated structure constituting a new, special and continuing injury to plaintiff; that by these acts of defendants plaintiff's premises have been and are deprived of light, air, access, ventilation, privacy, stability, quiet and other rights, and the said easements appropriated and thereby the value of the said premises and of the use thereof largely depreciated, to his damage; that defendants threaten and intend to add to and complete the elevated structure, and upon completion thereof to operate trains thereon by and with steam engines: that thereby said premises will be further deprived of light, air, access, etc., and the said easements further appropriated; that the said injuries will be constant and continuous trespass; that the said acts of defendants have been, are and will be without warrant of law, without his consent and compensation to him; he prayed judgment enjoining maintenance and use of the elevated structure;

> "or that the court shall determine the amount of damages to the fee value of said premises in consequence of the appropriation by defendants of plaintiff's said easements, as aforesaid, amounting, as the plaintiff alleges, to one hundred thousand dollars and over, and that, unless the defendants shall forthwith pay the same to the plaintiff, the defendants be enjoined from using the said elevated railway structure and depression, and from continuing the same opposite the said premises."

ANSWER.

The answers of the defendant railroad companies, *inter alia*, denied that they had built, or were building, or intended to add to or complete the elevated railroad structure; admitted ownership and lease of and previous maintenance and operation of the railroad and the purpose and intent to operate it on the elevated structure upon its completion; and further alleged:

That pursuant to the act of 1807, a map or plan of public streets was filed April 1, 1811, exhibiting Fourth avenue of the width of one hundred feet. That by the act of 1831 the N. Y. & Harlem R. R. Co. was incorporated to construct a railroad within the bounds and between the termini named, and in pursuance thereof located its road and made and duly filed a survey and map thereof which by resolution of October 22, 1831, was duly approved by the proper city authorities, which road as located, occupied a twenty-four foot strip of land having its center line coincident with the center line of Fourth avenue as exhibited on said city map.

That by ordinance of December, 1831, the city council granted permission for the building of the road upon conditions which were agreed to by and between the city and the railroad company of date January 9, 1832. That thereafter the railroad company acquired title to the said twenty-four foot strip of land extending from Harlem river to Forty-second street, including that in front of plaintiff's described premises, with the power of sloping embankments or excavations the full width of the avenue, and many years prior to the city's acquirement of title to the avenue the railroad company had its road constructed and in operation upon the said strip of land and so continued until the changes required by the acts of 1867 and 1872, respectively, were successively made. That by reason of the existence of the railroad, and in pursuance of the memorial of the Mayor, etc., the act of 1837 was passed altering the city map by adding twenty feet upon either side of this avenue.

That the railroad company's acquirement of its said title and building of its road was many years prior to plaintiff's acquirement of title, if he has any, to the premises described, all in pursuance of said act of incorporation and with the acquiescence of plaintiff's predecessors in title. That in pursuance of the act of 1848 the New York and New Haven (now New York, New Haven and Hartford) Railroad Company in that year acquired from the Harlem Company the right to run its trains over this portion of said railroad, which it has ever since done and is now doing. That by proceedings instituted in 1850 under and in pursuance of and subject to all of the acts, ordinances and agreements relating to the said Fourth avenue, and to the said railroad therein and resulting in an order of confirmation entered in October, 1853, the city of New York assumed to acquire title to the land within the lines of said avenue, from Thirty-eighth street to the Harlem river, subject, nevertheless, to the right of the Harlem Company, its successors and assigns to maintain and operate its said railroad therein conformable to lawful public regulation. That by the act of 1872 as and by way of eliminating grade crossings and otherwise improving the avenue, a prescribed statutory grade of the railroad from Forty-fifth street to the Harlem river was provided and established, and provision made for viaducts and over and under crossings, all whereof was carried out and maintained and used thenceforth, and still is. That in April, 1873, the railroad was leased to the Central Company, which entered thereunder, and is now in sole possession thereof. That on April 19, 1892, the Legislature passed an Act entitled "An Act to regulate, improve and enlarge Park Avenue above 106th Street," etc., known as Chapter 339 of the Laws of 1892, and which act has been duly amended by Chapter 548 of the Laws

of 1894, Chapter 594 of the Laws of 1896, and Chapter 613 of the Laws of 1898.

That under and pursuant to section 13 of the Act of 1892 the board therein designated was appointed and organized and thereupon took entire charge of and proceeded in the execution of the work prescribed by said act, and in that behalf made sundry contracts whereunder all requisite structures, both permanent and temporary, have been and are being constructed under the sole supervision of said board and in part at the expense of the city of New York and thereby the provisions of the said act have been carried out and executed.

That all the said changes that have been made were necessary to carry out the provisions of the said acts and necessary to carry into effect the therein prescribed enlargement and improvement of the avenue.

Also pleaded the statutes of limitations and adverse possession for a period of more than twenty years (pp. 6–13).

Trial.

Upon trial of the issues thus joined plaintiff gave evidence tending to prove his title to the described premises and to the claimed appurtenant easements, and the measure of damage to the usable and fee value of his premises ascribable to the maintenance and use of the railroad structures and train operations; and defendants gave evidence tending to prove the public and private authorities, consents, agreements grants and uses whereunder they claimed the right as against plaintiff to possess and use the previously and then existing railroad structures and maintain operations thereon respectively (pp. 21–69).

History of Avenue and Railroad.

Stated as briefly as may be, the origin and history of the avenue and railroad are as follows:

Chapter 115 of N. Y. Laws of 1807 provided for the making of a map or plan of proposed streets and avenues in the upper or northerly portion of the City of New York and in and by sections 9 to 11 thereof provided for acquirement of title by the City as, from time to time, it might determine to open any or either of such streets or avenues (page 33).

In pursuance of this Act such map or plan of the City was made and filed in April, 1811 (page 63; Defts.' Ex. 1).

By Chapter 263, N. Y. Laws of 1831, The New York and Harlem Railroad Company was incorporated, with authority to build a railroad from Twenty-third Street to the Harlem River, the location thereof not to be final until approved by the Common Council of the City, and not to occupy the ground within any street or avenue as shown upon the map or plan of

the City, whether opened or unopened, unless consented to by the City (page 48).

In August, 1831, the railroad was located with its centre line coincident with the centre line of the Fourth Avenue, then unopened, as shown upon the city map (page 64; Defts.' Ex. 2).

This location thereof was consented to by the city, and that consent and the terms and conditions thereof evidenced by agreement in writing of date January 9, 1832 (page 27).

By their respective deeds of date January 18, 1832, Peter Poillon purported to convey north of the centre line of the old Harlem Road, and Benjamin L. Benson purported to convey south of that line, to The New York and Harlem Railroad Company the centre 24 feet, with the right to occupy with their embankments or excavations the entire width, 100 feet, of the Fourth Avenue, as laid out on the said city map (pages 49-51 and page 65, Defts.' Ex. 3).

By reason of the existence of the railroad in this avenue the city map was changed by Chapter 274, N.Y. Laws of 1837, by adding twenty feet upon either side of the Fourth Avenue (page 48).

By proceedings instituted in 1850 and consummated in or about 1853, the city assumed to acquire title to the ground within the lines of and to open Fourth Avenue from 38th Street to the Harlem River, under and subject unto all of the laws, ordinances, agreements and consents relating thereto, and thus subject to the right of The New York and Harlem Railroad Company to maintain and operate its railroad within the bounds thereof (pages 33, 34, 65).

The railroad at this point was approximately at a level with the general surface of the land, consisted of two tracks, and was thus maintained and operated from in or about 1835 to and until after 1872 (pages 46, 64).

Under authority of Chapter 702, N. Y. Laws of 1872, the railroad was depressed and two additional permanent tracks were laid, the change of grade, and also the relation of the grade of the avenue to the former, and to the newly-established grade of the railroad, being indicated by Defendants' Exhibit 5; and the character of the 1872 structure is indicated by the dotted lines on Defendants' Exhibit 8 (pages 66, 69).

Chapters 339, N. Y. Laws of 1892, and 548, N. Y. Laws of 1894, were put in evidence by plaintiff (page 33) and by defendants (page 48), each without objection by the adverse party.

The change of railroad structure under authority of these Acts was made by the State Board which the Act of 1892 provided for, and the character of that change thereof and the fact that the exterior lines of the present structure are within

the exterior lines of the former structure, are shown by Defendants' Exhibit 8 (opposite page 69), the accuracy whereof is testified to and in nowise disputed, and the reception of the map in evidence not objected to (page 56).

The ground within these lines was, prior to the change under the Act of 1892, devoted to and used for railroad purposes exclusively, and the public had no access across it either directly in front of plaintiff's premises nor at 115th Street, upon which plaintiff's premises corner; the public highway really consisted of two streets, one on each side of the old structure (pages 15, 45, 52). Now, the avenue and 115th Street are open thoroughfares affording free access across every portion thereof (page 52 and black lines on Defts.' Ex. 8, opposite page 69).

DECISION.

Thereafter the trial judge filed his decision "stating concisely the grounds upon which the issues herein are decided," reciting that plaintiff has been since 1888 and is the owner of the described premises, and had and has appurtenant thereto certain easements of light, air and access in and over Park avenue; that the defendant Harlem Company has at all times been and is the owner of the described railroad and railroad structures and the Central Company lessee thereof under lease of date April 1, 1873, for the term of 401 years; that prior to 1872 the railroad was operated upon two tracks laid upon the street surface along the centre thereof; and

"THIRD.—That pursuant to chapter 702 of the Laws of 1872, certain changes were made in said railroad in front of said premises, between the years 1872 and 1878, whereby the number of tracks were increased from two to four; that said tracks were laid along the centre of said avenue, and at the south line of said premises were at the surface of said avenue and at the north line of said premises said tracks were laid in a trench about 5½ feet in depth below the surface of said avenue; that said railroad was bounded on both sides by masonry walls about 3 feet high above the surface of said avenue in front of said premises, cutting off access across said avenue immediately in front of said premises; that said defendant The New York Central and Hudson River Railroad Company in the year 1878 began to operate its trains over said last-mentioned railroad in front of said premises, and continued to maintain and operate said railroad from said year down to February 16, 1897.

FOURTH.—That pursuant to chapter 339 of the Laws of 1892, there was constructed along Park avenue, in front of plaintiff's said premises, between April, 1893, and March,

1896, a new permanent elevated railroad structure of iron and steel; that said railroad in front of plaintiff's said premises is about 59 feet wide and consists of four tracks laid on a solid roadbed having a mean elevation of about 31 feet above the surface of said avenue, which roadbed is girded along the sides and in the centre by solid iron girders each 7 feet and 4 inches high, and is supported by iron columns, of which there are six directly in front of plaintiff's said premises; and that the work of constructing said permanent elevated railroad structure was done under the supervision of a board created by said act.

FIFTH.—That the defendant The New York Central and Hudson River Railroad Company laid the tracks on said permanent elevated railroad structure about March, 1896, and from said date down to February 16th, 1897, operated thereon in front of said premises trains of cars drawn by steam engines for the carriage of freight and material used in the construction of said structure, for which service said defendant was paid; that said defendant on February 16th, 1897, began to operate regularly and permanently upon said permanent elevated railroad structure in front of plaintiff's said premises its passenger trains, drawn by steam locomotives.

SIXTH.—That the rental and fee values of the plaintiff's said premises were damaged by the work of constructing said permanent elevated railroad structure and by the existence of the same from April, 1893, to March, 1896; also by said structure and the operation thereon of trains, as aforesaid, from March, 1896, to February 16th, 1897, but that neither of said defendants is liable for such damage.

SEVENTH.—That the said permanent structure and the operation by said defendant The New York Central and Hudson River Railroad Company of passenger trains thereon since February 16th, 1897, are and have been a continuous trespass upon the plaintiff's easements of light and air appurtenant to his said premises, hereinbefore described as having a frontage of 76 feet and 10 inches on said Park avenue and a depth of 26 feet on 115th street; that solely in consequence of said trespass, and aside from any other causes, the rental and usable value of said premises was depreciated from February 16th, 1897, down to October 10th, 1900, in the sum of fourteen hundred dollars ($1,400) below what said rental value would have been during said period, if there had been no change in defendants' said railroad in Park avenue in front of said premises pursuant to chapter 339 of the Laws of 1892; and that the fee value of said premises has been, and was on October 10th,

1900, depreciated thereby in the sum of three thousand dollars ($3,000) below what said fee value would have been on said date if there had been no change in defendant's railroad as aforesaid.

EIGHTH.—That the said sums awarded as damages are over and above any and all benefits conferred upon said premises by the changes made pursuant to chapter 339 of the Laws of 1892, which said benefits result in part from improved access to said premises afforded by said changes, and are offset against the damages to said premises caused by said changes.

NINTH.—That the said sums awarded as damages are exclusive of the damages that would have been occasioned to plaintiff's premises by the maintenance and use of the defendant's railroad and structures had there been no change in the same pursuant to chapter 339 of the Laws of 1892, for which last-mentioned damages the defendants are not liable either jointly or severally." (pp. 14–16.)

JUDGMENT.

The judgment awarded and entered was: "I.—That the defendants The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, and each of them, and their officers, agents and servants, and all persons claiming under or through them, be enjoined from maintaining or in any way using their permanent elevated railroad structure and its appurtenances in front of the plaintiff's premises, being situated on the northwesterly corner of Park avenue and 115th street, and having a frontage of 76 feet and 10 inches on said avenue and of 26 feet on said street, and be further enjoined to take down and remove the same from in front of said premises; but said injunction shall not be operative for twenty days after service upon defendants' attorneys of notice of entry of judgment herein.

II.—That in case the said defendants shall, at least five days before the said injunction shall become operative, tender for the purpose of execution by the plaintiff and by all other persons having any title to, interest in or lien upon the said premises, a form of conveyance and release to said defendants of the plaintiff's easements of light, air and access appurtenant to said premises, taken by the maintenance and use of defendants' said permanent elevated railroad structure, as the same is now maintained and used; and in case the plaintiff and all other persons having any title to, interest in or lien upon the said premises, shall execute such conveyance and release, and

shall tender delivery thereof to the said defendants; and in case the said defendants shall thereafter pay or tender to the plaintiff's attorneys the sum of three thousand dollars ($3,000) with interest thereon from October 10th, 1900, then the said injunction shall not in any manner become operative; and in case the plaintiff fails to deliver or tender for delivery said conveyance and release, executed as aforesaid, the said injunction shall not in any manner become operative." (pp. 18–19.)

Judgments in Appellate Courts.

That judgment was in all things affirmed by the Supreme Court, Appellate Division, and both parties appealed therefrom to the Court of Appeals.

The latter court ordered and adjudged reversal of the judgment and dismissal of the plaintiff's complaint on the merits and remitted the case to the Supreme Court, wherein judgment was entered accordingly on the said remittitur.

Alleged Unconstitutionality

The particulars wherein plaintiff claims that Chapter 339 of New York Laws of 1892, is violative of the Constitution of the United States are that thereby

1. Plaintiff is deprived of his property without due process of law.

2. That the obligations of contracts are impaired. Remittitur (pp. 1 and 2).

Or, as is more fully set forth in the order to amend the remittitur (pp. 77, 78):

"(1) That chapter 339 of the New York Laws of 1892, and the acts amendatory thereof, violate section 1 of article XIV of the amendments to the United States Constitution, in that the said acts deprive the plaintiff of property without due process of law, which said property consists of rights and easements of light, air and access in and over Park (or Fourth) avenue in the city of New York, the said rights and easements being appurtenant to the plaintiff's premises abutting on said avenue.

(2) That chapter 339 of the New York Laws of 1892, and the acts amendatory thereof, violate section 10 of article 1 of the United States Constitution, in the respect that the said acts impair the obligation of a contract, to wit, the contract under which Park (or Fourth) avenue in the city of New York was dedicated as a public street in and by the deed of Peter Poillon to the mayor, aldermen and commonalty of the city of New York, dated July 24, 1827; and in the further respect that the said acts impair the

obligation of the contract existing among the parties to this action, and arising from the fact that the said parties all claim title under said Poillon through conveyances which recognize the character of said avenue as a public street, and which refer to public maps whereon said avenue is so represented."

To what these have Relation.

Consideration thereof involves cognizance of:

First.—The nature, character, status and condition of the supposed property and property rights, the subject of the action, to which the enactment in question is deemed to apply and pertain.

Second.—The nature, character and effect of the rules of law embodied in the enactment.

Third.—Whether in any, and if any what respect or particular, the provisions of the enactment as applied and administered in the case in hand have operated to or had effect to deny to plaintiff, or deprive him of due process of law, or remedy, either in respect of property appropriated, or in respect to contract obligation contravened.

Paragraph "Ninth" of the above decision is in all essentials identical with the finding upon the same subject in the *Fries* case, concerning which the Court of Appeals by O'Brien, *J.* (169 N. Y., 270), at page 278, said:

"On the 15th of February, 1897, it is found that the defendant was rightfully and lawfully operating its railroad in this public street. The next day, as has been decided, it became a trespasser, not only in running trains upon the viaduct, but by maintaining it in the street. It would seem to follow from this that while the State had power to do everything that was done and to compel the railroad to be operated upon the viaduct, yet the railroad was guilty of a trespass in doing so; that is to say, the State compelled the railroad to commit a trespass and the railroad must be held liable for everything done by the State in the exercise of its supreme authority. The conclusion of the learned trial Judge seems to me to involve this method of reasoning, and it would seem that a result which in its last analysis depends upon such arguments must necessarily be unsound.

The elevated railroad cases in this Court proceed upon the principle that, as against abutting owners, the railroad was unlawfully in the street, as they had not consented to the construction or conveyed the right to interfere with their easements. But in the case at bar we have an express finding that the defendant had acquired the right as

against the plaintiff to use the street for the operation of the railroad. Hence, the principles upon which that mass of litigation proceeded have no application in this case, and so this Court has held (Conabeer *vs.* N. Y. C. & H. R. R.R. Co., 156 N. Y., 474)."

The gist of the matter ruled upon as above, and followed in this case, is stated in the majority opinion herein, rendered by PARKER, *Ch. J.*, as follows:

"Although at the time of the decision of the *Lewis* case we accepted as sound the proposition that, when defendant commenced to use the steel viaduct, it started a new trespass upon the rights of the abutting owners for which it could properly be held liable, subsequent reflection persuaded the majority of the court that this was error. The reasoning which seemed to command the latter conclusion was, briefly, that the state, setting about making improvements in Fourth avenue which were to benefit the general public, found defendant in possession of four tracks in the middle of the avenue, with the right to operate its trains upon them, which it was enjoying. The state could not if it would—and probably would not if it could—deprive defendant of its right to operate its trains in the street. But it had the power in the public interest to compel it to run its trains upon a viaduct instead of in the subway. So the state builded the viaduct over the part of the street formerly occupied by the subway and compelled it to stop running its trains in the subway and to run them on the viaduct instead. The state had the power to do these things and all of them, and defendant, having the right to move its trains over the street, which could not be taken away from it, did not lose that right and become a trespasser because it obeyed the command of the statute, which it could not refuse to obey, to operate its trains upon the structure which the state had built.

"The plaintiff was injured by the change, as appears from the findings. But who caused the injury? The defendant, which obeyed the command of the statute which it had not the right to resist, or the state, which had the power to make the changes which were made in the street and did make them and then compelled defendant to make use of them? The question admits of but one answer, and that is, it was the state.

"When the question was again presented, therefore, as it was in the *Fries case* (*supra*), we attempted to cure the error which we concluded we had made in the *Lewis* case. The opinions in the *Fries* case were written by Judge O'BRIEN and Judge MARTIN. In the course of Judge O'BRIEN'S opinion it is said:

"'I am unable to perceive any reason why the legislature

had not the power to improve the avenue by removing the railroad from the cut to a viaduct, and if the change affected the rental or fee value of the property of an abutting owner having no title to the street, it was but a consequence of the improvement, for which the railroad was not responsible. The law is well settled in this state that where the property of an abutting owner is damaged, or even his easements interfered with in consequence of the work of an improvement in a public street conducted under a lawful authority, he is without remedy or redress, even though no provision for compensation is made in the statute. Whatever detriment the improvement may be to the abutter in such cases is held to be *damnum absque injuria.*'

"Judge MARTIN states the principle as follows: 'It must also be admitted that all the acts of the defendants for which the plaintiff claims they are liable were performed under and in accordance with the direct and express mandate of that statute. That there was no encroachment upon or actual interference with the plaintiff's premises, and that the improvement was made for the benefit of the public, and in a proper manner, are likewise practically conceded. Hence, the broad question presented is whether, in the absence of any statute providing for compensation, the defendants are liable for remote or consequential damages in having performed only such acts as were required by the express provisions of the statute upon works of a public nature, where there was neither negligence nor want of skill, and no direct invasion of any private property of the plaintiff. We think not. In every civilized community controlled by governmental or municipal laws or regulations, there are many cases where the individual must be subjected to remote or consequential damage or loss, to which he must submit without other compensation than the benefit he derives from the social compact.

"The judgment was accordingly reversed. That decision was deliberately and carefully made, and reflected the view of a majority of the members of this court at that time, and still does" (printed record, pp. 92, 93).

POINT I.

The jurisdiction invoked, the hearing had, the determination thereon, and resultant adjudication, all had relation to and involved solely the application of the rules and the principles of local property law in force prior to the 1892 enactment, and remaining in force unaffected thereby, to the status of property right which had resulted from the grants express or implied antedating that enactment.

Character of Abutters' Easements.

The contributions of the courts of the State of New York to the judicial history of abutters' easements in urban public highways, serve to emphasize rather than to derogate from the proposition that such easements are the creation of, and their existence, character and scope, and the limitations to which they are subject, are to be determined by those statutes and rules of the state or local body politic within and by whose jurisdiction the highway was created, and with especial reference to any and all statutes, conditions and circumstances whereby the particular highway, easements in which are in question, is in any wise constituted an exception to the ordinary, and in such wise and measure subject unto somewhat peculiar rules and measures of public and private right and relative property right.

Upon this subject, Peckham, *J.*, writing for the Court of Appeals, said:

> "The easements of abutting owners in New York city, who are without title to any portion of the streets upon which their lands abut, differ somewhat in their origin from ordinary easements. They have not been created by grant or covenant, but it is said of them that it is easier to realize their existence than to trace their origin; that they arise from the situation, the course of legislation, the trust created by statute, the acting upon the faith of public pledges and upon a contract between the public and the property owner, implied from all the circumstances, that the street shall be kept open as a public street, and shall not be devoted to other and inconsistent uses."
>
> *White* vs. *M. R. Co.* et al., 139 N. Y., 19, 25.

That is to say, ascertainment and determination as to what trust was created by, and what public pledges and what im-

plied contracts, originated in and attended the opening of the particular street, easements wherein are in question, are to be had and reached by resort to the situation, the course of legislation, the statutes under which the street was opened as a public thoroughfare, and all of the circumstances giving character to the proceedings thereunder, together with the history of the street, and easements therein, from the opening thereof to the installation of that the rightfulness whereof is the subject of dispute; and in the light of all this the status and character of the street, and of abutters' easements therein, are to be ascertained, and therefrom may be determined whether in and by installation therein of the thing complained of, the street has been "diverted to other and inconsistent uses," and existing easement rights trespassed upon.

From this it follows that the mere fact of creation and existence of an urban public highway does not *per se* produce in every instance the one specific cut or pattern of abutter's easement.

The street opening proceeding is the method or process of creating rather than the creative source of the easement.

By that method or process the public authority addresses itself to the situation which it finds existing, deals with that situation under authority of the general course or body of legislation relating to such exercise of power, executes and carries into effect the trusts created by adaptation thereto of all the statutory provisions under authority whereof the particular public open street is brought into existence; and thus creates the street for and subject unto such uses and purposes, and vests abutters' easements therein of such scope, extent, quality and character as the peculiar circumstances of the property and proceeding indicate and imply.

After Creation may be Limited or Modified.

Moreover it is also obvious that abutters' easements which at their inception are wholly or measurably similar in scope, extent or quality, may in these respects become or be rendered dissimilar by subsequent acts and conduct of public authorities and property owners, or by acts and conduct of either acquiesced in by the other.

In so far as plaintiff's easements of light, air and access over the one-hundred-foot planned avenue were created and brought into existence by the grants and acts of Poillon and of his immediate or remote grantee, those easements were like any other property subject unto the operation of rules of law pertaining to and governing the rights of eminent domain, private grant, express or implied, abandonment, surrender and adverse user, and all such rights as any of these might originate or evidence.

The Harlem Company was by Section 8 of its charter specifically authorized to take title in fee to all lands requisite for its road.

That under the law of the State of New York a railroad company, though chartered for a term of years, may take a perpetual easement in, or title in fee to, lands necessary for its use, was expressly decided by the Court of Appeals in *People* v. *O'Brien*, 111 N. Y., 1, and *Miner* v. *Railroad Co.*, 123 N. Y., 242. In reference to the doctrine of these cases Mr. Justice Peckham, writing for this Court in *Detroit* v. *St. Ry. Co.* (184 U. S., 368), at page 395, said:

> "It is not a new one, and the decisions have all been one way, in favor of the right of a corporation, limited as to the time of its corporate existence, to purchase or acquire by agreement or condemnation property for its use, the title to which it might own in fee."

The *Miner* case, is also authority in support of the proposition, that under the law of New York, such railroad company may successfully stand upon twenty years' adverse possession as a bar to recovery in respect to such land. Upon that subject Earl, *J.*, (Id, p. 251) said:

> "From 1850 to the commencement of this action, more than thirty years, this land was held and possessed under a claim of right, adversely, by the defendant, and its predecessors in title. During the first twenty years of that time, unless a perpetual easement for railroad purposes was originally taken, the possession was wrongful and the owners of the fee could have re-entered or brought ejectment. That under such circumstances the action is barred by adverse possession is free from doubt."

Snell v. *Leavitt* (110 N. Y., 595), involved title to an easement. The Court of Appeals by Earl, *J.*, at page 602, said:

> "It could be lost by adverse user or possession by the owner of the servient tenement, and the easement could be lost and extinguished by abandonment in some of the modes or by some of the means recognized in the law. Non-user for the period of twenty years, under such circumstances as show an intention to abandon and give up the easement, is sufficient to extinguish it."

That case was cited and followed in *Woodruff* v. *Paddock* (130 N. Y., 618), involving title to an easement in an alley, which had been opened to and used by the public more than twenty years, and subsequently kept closed for an equal period. The Court of Appeals, by Follett, *Ch. J.*, at page 624, said:

> "It is settled that under the Statute of Limitations of this State the legal title to land may be lost by its true

owner, and be acquired by one holding it adversely for twenty years (*Baker* v. *Oakwood*, 123 N. Y., 16).

"So an easement may be lost by adverse possession if the owner or possessor of the servient estate claims to own it free from the private right of another, and excludes the owner of the easement, who acquiesces in the exclusion for twenty years."

Consequent upon some one or more of these happenings or exigencies, among others the grant of Poillon to it, the railroad company in or about 1835 entered into possession of the strip of land having as its center line the center line of this planned and proposed but then unopened avenue, built its two track railroad thereon, and thenceforth maintained and operated it thereon.

The railroad grade thus established was not conformable to or coincident with the grade of the avenue, because no avenue, and hence no avenue grade, was in existence. That the railroad grade did not, and as a practical railroad grade could not, even approximately, conform to the natural surface of the ground, appears by the map and profile of original location of the railroad, a copy of this portion whereof is produced (Defendants' Exhibit 2, page 64).

That the grade of the railroad and that of the subsequently opened avenue were not coincident is shown by the map and profile of "present grade" of the railroad, the "established grade" thereof as prescribed by the Act of 1872, and of the "avenue grade," a copy of this portion or section whereof is produced (Defendants' Exhibit 5, page 66).

Status at Date of Avenue Opening.

The situation to which the avenue opening proceeding was addressed, and with which it dealt, was that Poillon, the common source of title of all parties hereto, had granted to the city in trust for street purposes the one hundred feet width of the originally mapped avenue, and, to plaintiff's predecessors in title and others, the land abutting the avenue, and had subsequently purported to convey to the railroad company the middle twenty-four feet of the mapped avenue with the power of sloping embankments and excavations the full width of the avenue; the city had approved the location of and consented and agreed to the building of the railroad as located, the railroad had been thus built and put in operation, and the Legislature had altered the city map by adding twenty feet width on either side of this avenue; thereupon by that proceeding the city assumed to acquire from respective owners thereof the twenty-foot added strips of land, and from the railroad company for nominal consideration the fee of the center twenty-four-foot strip; and as to the thirty eight feet width either

side of the twenty-four foot strip, the city rested upon the title "ceded" by the said deed of Poillon to the Mayor, etc. (see map Exhibit 3, opposite page 65).

AVENUE OPENING, HOW RAILROAD AFFECTED THEREBY.

The avenue opening proceeding found the railroad and its operations existing facts, the rightfulness whereof was not therein questioned by abutting owners. The railroad company was awarded one dollar per block or twenty dollars per mile for the naked legal title to the land constituting its road bed, but nothing for, because not purporting to take from it, the right to there maintain and operate its railroad. The street was opened each side of, but not upon or over the ground occupied by the railroad.

The effect of that proceeding upon property rights, occupancy and uses existing prior to and at the initiation of the proceeding is to be ascertained from a view of the proceeding itself, as exhibited by the record thereof, in the light of the status of property right, occupancy and use, and all other circumstances with which the proceeding dealt, and in the light of all the statutes, ordinances, consents, agreements and grants whereby that status was created and whereunder the proceeding was had, and also in the light of the interpretation, force and effect imputed to the proceeding by the acts, conduct and acquiescence of State and municipal authorities and parties in interest at the date of the proceeding, and thenceforth to and until the doing of the acts constituting the supposed trespasses herein complained of.

ADDED NOTHING TO ABUTTERS' EASEMENTS.

Quite obviously this character of proceeding did not bring to or vest in the abutting owners any additional easements in the original one hundred feet width of the avenue, and that it did not was adjudged in the *Conabeer* case, *infra*.

That as matter of rule of property law such taking of the naked legal title of the railroad ground, in so far as, if at all, that ground was thereby impressed as potentially a part of the public street, served to vest in the State the right and power of prescribing and enforcing reasonable regulation of the place where and manner in which the railroad should be maintained and operated, as and by way of promoting the usefulness of the street for public travel therein, was adjudged in *Albany* v. *Railroad Co.*, 108 N. Y., 14, affirming 45 Hun, 442. The public right being to regulate, but not to terminate or exclude railroad occupancy and use, abutters' easements were of necessity of naturally consequent limited and qualified character.

It needs not to dispute that the deed of 1827 of Poillon to the Mayor of the land within the avenue in trust for street purposes was a potential dedication for a street unincumbered by a railroad. In 1850, by the proceeding to open the 140-foot avenue, the city gave its first token of its acceptance of the Poillon dedication.

As that proceeding did not purport to provide or contemplate ouster of the railroad, that exigency afforded notice and opportunity to the then abutting owners, plaintiff's predecessors in title, to assert that whereas by the 1827 Poillon deed this land was dedicated for street purposes free of railroad uses, therefore the city might not lawfully accept such dedication as, or change the subject matter of the dedication to, a street incumbered by a railroad, with the right, power and burden of public servitude and public regulation suitable to such respective or joint occupancy and use.

What the city did, and those abutting owners, plaintiff's predecessors in title, acquiesced in, was, it treated the subsequent grant by Poillon to the railroad company, the railroad company's possession, and abutter's acquiescence, as evidencing meantime *pro tanto* diminution of the subject matter of the dedication, and accepted it as thus diminished. If and so far as there has been impairment of the obligation of the grant of Poillon to the Mayor, or of the obligation, if any, growing out of the railroad taking title to land described as a part of the mapped and planned avenue, they were impaired in and by the then existence of the railroad, and the city's first acts signifying acceptance of the dedication as and for a railroad street, all with the acquiescence of the then abutting owners, including plaintiff's predecessors in title.

Whether by means thereof, and subsequent acquiescence therein until 1897, they lost the right to assert and rely upon the obligations of these respective contracts is not a Federal question. *Eustis* v. *Bolles*, 150 U. S., 361; *Pierce* v. *Railway Co.*, 171 U. S., 641; *Moran* v. *Horsky*, 178 U. S., 205.

The status continued after, as it had been before the avenue opening, as regarded the relations between the railroad company and the owners of land abutting the avenue, that the railroad possession, occupancy, maintenance and operation had every characteristic of exclusion therefrom of all other persons, rights, interests and uses, identical with that of a right of way owned in fee by the railroad company (see par. third, page 15).

What 1872 Enactment Dealt With.

The 1872 enactment found and dealt with the avenue and railroad, with its public street grade crossings, and for the elimination thereof and otherwise improvement of the avenue for public travel and safety therein, prescribed the regulation

of avenue and railroad, which regulation was carried into effect, and thereunder was created the status which existed thenceforth until the carrying into effect of the enactment of 1892.

Status Dealt with by 1892 Enactment.

At the time of the 1892 enactment, the avenue, and the exclusive occupancy and use of land by and for the railroad within the bounds thereof, were existing facts, and owners of land abutting the avenue had no property right whereupon they might prevent continuance of the railroad maintenance and operation. (Trial Judge's decision par. Third and Ninth, pp. 15, 16.)

What the State Assumed to Do.

As and by way of regulation thereof the state assumed to exercise the right and power to provide for the enlargement and improvement of the street by including therein, and extending the usable surface thereof over, the sixty-foot strip theretofore and thereunto occupied and used exclusively for railroad purposes, by provision and regulation which did not bring the railroad structure and operations either upon plaintiff's premises or upon the previously existing open street, upon which plaintiff's premises abutted.

These respective 1872 and 1892 enactments did not have to do with relations or status created by the deed of Poillon to the Mayor, etc., of the land within the mapped and planned one hundred foot avenue in trust for street purposes, the filing of maps of allotment conformable to the said city plan, and conveyance of lots abutting the avenue to plaintiff's predecessors in title; but each in turn had to do with and dealt with the status and conditions existing at the date of the respective enactment.

Scope of Adjudications.

The state courts in determining and adjudging the force and effect of and validity of the Act of 1872 and Act of 1892, respectively, were not called upon to and did not determine or adjudge the force, effect and validity of those respective enactments with reference to status or conditions existing in 1827, the date of the said Poillon deeds to the Mayor, etc., and to plaintiff's predecessors in title, or in 1831 and 1832, the dates of location of, and public and private agreements and grants to and for the building, maintenance and operation of the railroad, or in 1850 to 1853, the date of the street opening proceeding. They did determine and adjudge the effect and validity thereof with reference to the status and conditions of public and private right and relative property right existing and in effect at the dates of the respective enactment, the force

and effect and validity whereof constituted the subject matter of adjudication, and of the alleged trespass.

What Plaintiff's Contention Assumes.

Plaintiff's contention for affirmance of the judgment of the Trial Court, whereby for the compensation named plaintiff was to grant and defendants acquire the property rights in question, presupposes that his property, if taken at all, has been taken for a purpose for which it was subject to be taken upon making compensation therefor.

Plaintiff's Case is a Virtual Condemnation Proceeding.

It is not and cannot be disputed that defendant Harlem Company was and is possessed of the right of eminent domain whereby to acquire property necessary to the lawful maintenance and operation of this railroad. Plaintiff's complaint setting forth the facts therein alleged and asking damages in respect of past maintenance thereof, and injunction or compensation in respect of its future maintenance, and prosecution of that complaint to final judgment, constituted in every respect the legal equivalent of a condemnation proceeding.

American Bank Note Co. vs. *N. Y. E. R.R. Co.*, 129 N. Y., 252.

Bohm vs. *M. E. R. Co.*, 129 N. Y., 576.

Sperb vs. *M. E. R. Co.*, 137 N. Y., 155.

That principle is well and tersely stated in the *Bank Note Company* case, as follows:

> "There is no doubt in this case, and I think no doubt in any case, that the injunction of a court of equity and its alternative damages are to be deemed a substitute for the ordinary proceeding for condemnation, with the practical difference only that in the one case the company is the moving party and in the other the owner." * * * There is no difficulty in assuming that the alternative damages are awarded to the same extent and for the same elements as the compensation given in a special proceeding for the condemnation of land under the law of eminent domain. Such a process in each case ends in the same substantial redress. The form is different but the result is identical. It follows, therefore, that the alternative damages of equity must be such and only such as would be given in a proceeding for the condemnation of lands for a railroad use, due regard being had to the different characteristics of the property to be taken. We must, as a consequence, recur to the legal rules which have been established in such cases.
>
> They have their foundation in the constitutional pro-

vision that private property shall not be taken for public use without just compensation, and in the terms of the General Railroad Act formulating the mode of procedure" (129 N. Y., 270).

And again, by Hon. Peckham, *J.*, in *Bohm* vs. *M. E. R. Co.* (129 N. Y., 576):

"Although these are suits in equity, commenced to obtain equitable relief and to prevent the defendants from operating their road unless they pay the plaintiffs the damages they will sustain from the permanent interference by the railroad with their easements of light, air and access, yet the rules upon which such damages are to be awarded are so far well settled as to enable us to say that those damages are only such as would be given in a proceeding for the condemnation of lands for a railroad use, regard being had to the different characteristics of the property to be taken in these cases (p. 584, 585). * * * There is no question made but that the defendants are liable to pay the full value of any property taken by them subject to no deduction whatever. How the value of the particular kind of property which is here taken shall be arrived at is the main, and indeed the only, question in these cases" (pp. 585, 586). * * *

"It seems to me plain, from this review of the law, that the real injury (if any) suffered by the land owner in any particular case, lies in the effect produced upon his abutting land by the wrongful interference of defendants with these easements of light, air and access to such land. And where they are interfered with, and in legal effect taken to any extent, it is not possible to think of them as of any value in and of themselves separated from the adjoining land, but their value is to be measured by the injury which such taking inflicts upon the land which is left, and to which they were appurtenant" (p. 588).

"The so-called Rapid Transit Acts under which the defendants were organized, provided that the commissioners of appraisal should not, in determining the amount of compensation, make any allowance or deduction on account of any real or supposed benefits which the party in interest may derive from the construction of the proposed railroad. The case of *Newman* decides that this provision does not mean that in examining the question whether injury has resulted to the abutting owner's remaining land by reason of the taking of a portion of the easements spoken of, the court cannot regard the fact that so far from injury, the land remaining had been specially enhanced in value by reason of the taking. On the con-

trary, it decides that such fact, of special enhancement in value, is material and may and must be considered upon the question of damage. It is not offsetting injury against benefits. It is discovering whether in reality there has been any injury to the remaining land. To prove that the land has been specially benefited may be proof that it has not been diminished in value. If it would have increased still more in value but for this taking by the road, that difference it must pay, because to that extent there would be damage. The *Newman* case is authority for the proposition that the easements are only of nominal value in and of themselves, and that the result of taking them must be looked for in the effect upon the adjoining land. If, instead of loss or injury that land has been specially benefited by the taking by the railroad company, then no damage has been sustained by the land owner" (p. 591).

Also in *Sperb* v. *M. E. R. Co.*, (137 N. Y., 155):

"The principle which should guide an award of damages to be paid by the railroad company in order to obviate the injunction, is the same as in proceedings under the statute to condemn property for the railroad use. The injunction of the court and the alternative damages are deemed to be a substitute for those proceedings. In computing the alternative damages, their extent and the elements should be the same as would be considered in the computation of the compensation to be given in proceedings for the condemnation of lands for a railroad use; due regard being had to the different characteristics of the property to be taken" (pp. 161, 162).

CASE STOOD UPON LAW ANTEDATING 1892 ENACTMENT.

If plaintiff was entitled to recovery of compensation for property taken or for contract broken, the Act of 1892 presented no barrier to his recovery, and it was not necessary to such recovery that the Act contain provision therefor; and therefore lack of such provision could not render it unconstitutional as constituting the taking of property without due process of law.

Reining v. *Railroad Co.*, (128 N. Y., 157).
Egerer v. *Railroad Co.*, (130 N. Y., 108).

In *Reining* v. *N. Y., L. & W. R. Co.*, (128 N. Y., 157), the trial court awarded and the Court of Appeals affirmed damages in favor of the abutting owner in respect of a railroad embankment in the street.

The street was sixty-six feet wide, the embankment twenty-four feet wide and five feet nine inches high, supported on

either side by perpendicular stone walls. The sidewalk was fourteen feet wide and the driveway between the sidewalk and the embankment insufficient for teams to pass or turn without difficulty.

The street was originally opened in the right of the ordinary public street easements, the fee of the soil being of individual ownership. Subsequently the city acquired the fee upon nominal consideration, and thereafter, in pursuance of charter authority so to do, gave its consent to the building and operation of the railroad in the street, and for this purpose to build and maintain the embankment complained of.

This case was distinguished from the *Fobes* case (121 N. Y., 505), in that public travel was practically excluded from the railroad ground. Its similarity to the *Story* case (90 N. Y., 122) was pointed out, and with reference to application of the principle of that case it was said, (p. 165):

> "It is enough if such part of the street is practically and substantially closed against them for ordinary street uses."

And, further on in the opinion (p. 170):

> "Here the plaintiff as we hold has a common law remedy for his injury."

In *Egerer* v. *N. Y. C. & H. R. R. R. Co.* (130 N. Y. 108), the action was for damages occasioned by construction of the elevated railroad in such wise as deprived plaintiff's abutting premises of light, air and access.

This elevated railroad structure was constructed by the railroad company in pursuance of and in conformity with an agreement between it and commissioners thereunto appointed and empowered by an Act of the Legislature.

> "The railroad company has laid its track upon this street with the consent of the City of Rochester, and by virtue of its right under condemnation proceedings. The right it acquired under the latter proceeding was the right to use this street to lay its track and run its cars, subject to the older and superior rights of the general public to use the street and, as we have seen, subject to the rights of the abutters to access, air and light." (p. 115.)
>
> *Held.* "We think the direction of a verdict for the defendant was error, and that the question of plaintiff's damages should have been submitted to the jury." (p. 116.)

ADEQUATE REMEDY AVAILABLE IF TRESPASS PROVEN.

In the *Reining* and *Egerer* cases the elevated railroad occupied ground which it was the right of the abutter to have devoted to public highway uses with thereunto incident ease-

ments of access, air and light. The damage thus occasioned was adjudged actionable and the remedies commonly available were applied and administered. In the case at bar the same remedies are recognized as available. Denial of right of recovery is not based upon absence or inavailability of suitable remedy, but upon the fact that the ground occupied by the railroad is that which had theretofore, as against plaintiff, been rightfully devoted to exclusive railroad occupancy and uses.

Railroad not Alleged to be a Public Nuisance.

If the basis of plaintiff's complaint and demand of relief herein had been that the former subway structure, or the present viaduct structure, and use of either, constituted a public nuisance occasioning him special injury and damage, it might have been competent for him in support of *such* contention to claim that the 1872 and 1892 enactments, respectively, were invalid in that the provisions thereof were not within the legislative right and power of reasonable police regulation. *Davis* v. *Mayor*, 14 N. Y. 506; *Hussner* v. *Railroad Co.*, 114 N. Y. 433.

Plaintiff, however, having specifically waived that basis of contention, and upon the other hand invoked and obtained hearing and adjudication upon the hypothesis that as regards the general public, each of the said railroad structures and the use thereof were lawful, and the railroad company lawfully entitled to appropriate whatsoever private property or private property right, if any it lacked, requisite to such maintenance and use thereof, it would not be consonant therewith for plaintiff now to contend that either the 1872 or 1892 enactment is invalid, in that it is an excess of or abuse of exercise of the legislative right and power of reasonable police regulation, as in either such respect an impairment of contract obligation or wanting the character of due process of law.

Character of 1872 and 1892 Enactments.

If the enactments as applied, administered and adjudged upon in this action, each in turn consist of mere police regulation, and do not in any wise operate to appropriate private property or private right to public use without compensation, but leave those properties and rights, the subject matter of the regulation, subject unto the governance of previously existing rules of law suited to administration and adjudication thereof and thereon as the right thereof shall appear, then and in such event, whatever, if any, failure of justice or right shall have resulted has not been occasioned by invalidity of or infirmity in the enactment, either by way of impairment of contract ob-

ligation or deprivation of property without compensation or without due process of law.

Without statement in detail of the provisions of the act of 1892, it is sufficient to say that it provides for the enlargement and improvement of the avenue and improvement of intersecting streets by means of prescribed change of grade of the railroad, the carrying of railroad bed and tracks upon a steel viaduct of such height and form as, with prescribed changes of avenue and street grade, will afford suitable clearance for highway travel, and that upon its completion railway operations shall be conducted thereon; and provides for removal of existing railroad structures and parapet walls, filling of cut and paving of surface like unto the then used portions of the avenue; it in no wise mentions or suggests the taking of private property, nor the existing provisions of law under which remedy is administered and compensation awarded and adjudged in favor of those whose property is taken for public use.

Plaintiff not Defeated by Lack of Remedial Law or Process.

Moreover, the ground upon which plaintiff was denied recovery and his complaint dismissed was not at all that there was any lack of adequate remedial process at his command for redress of any grievance provable or proven under his complaint, but solely upon the ground that upon all of the proofs presented no actionable grievance was established.

Plaintiff's proofs, the trial court's findings, and the consideration and judgment of each of the state courts followed the hypothesis of plaintiff's complaint in that neither thereof was in any wise addressed to consideration of the railroad structures or train operation as constituting a public nuisance because not in pursuance of or conformity with lawful authority, but solely to consideration of whether and the extent to which such maintenance and operations exceeded the property right which plaintiff or his predecessors in title had released, and invaded that to which plaintiff was still entitled.

In and by thus pleading, presenting and submitting his suit, plaintiff clearly and specifically invoked that jurisdiction of the court under which upon demand of relief by way of alternative compensation or injunction, the court is empowered to ascertain, determine and adjudge the fact of trespass, the extent thereof, the measure of compensation mete for permanent appropriation of property right of scope equal with the ascertained trespass, and to adjudge injunction consequent upon default of payment of such compensation.

Plaintiff did not invoke, and the courts did not in any wise or degree exercise, the jurisdiction to hear and determine that the complained of railroad structures and operations were or

were not a public nuisance as being without authority of valid law, and hence the proper subject of injunction absolute, and therefore not the subject of rightful continuance upon acquirement of and payment for private property, if any, thereby appropriated.

Character of Adjudication Herein.

Thus it is obvious that in so far as in this action the state *court was called upon to and did* consider and adjudge the constitutionality of the act of 1892, such consideration and adjudication had naught to do with the question of the power of the legislature to prescribe and enforce the therein provided change of regulation of the manner of maintenance and use of street and railroad, respectively, because the theory upon which the action was presented, submitted and determined was that the structure and use were lawful in every particular save that as against plaintiff they constituted a private trespass, to be redressed, not by abatement, but by suitable compensation upon the basis of permanency of maintenance and use thereof.

Thus the case cannot be deemed to present for judicial cognizance the question whether by means of, or by reason of, vested right or contract obligation asserted and relied upon by plaintiff or otherwise, the State had parted with or did not possess the legislative power to prescribe and carry into effect this public improvement.

The scope of judicial cognizance regarding the constitutionality of the enactments involved is therefore limited to inquiry regarding the operation, force and effect of their provisions in and by way of denying to plaintiff or depriving him of the due process and remedy customarily available in the exigency of a legally authorized and executed public improvement, concerning which plaintiff asserts and defendant denies that property vested in plaintiff has been thereby taken, or a status vouchsafed to him by contract obligation has been thereby overthrown.

Legislation and Judicial Decision to which this Review Pertains.

By way of affording ready reference to the legislation pertaining specifically to the matters in dispute herein, and to the judicial announcements entitled to most important regard herein, without rendering the brief unnecessarily cumbersome, an accompanying supplement contains copies of the several enactments, and of the opinions rendered in the Supreme Court, Special Term, in *People* ex rel. *N. Y. & Harlem R.R. Co.* vs. *Havemeyer*; in the Supreme Court, General Term, in *Tocci* vs. *Mayor*, and in the Court of Appeals in others of the cases.

Park Avenue Improvement Cases.

The following is a substantially complete list of the reported cases relating to the 1872 and 1892 railroad structures in Park Avenue; the last column refers to pages of the supplement to this brief:

Birrell *vs.* R.R. Co., 41 App. Div., 506; 60 App. Div., 630; 173 N. Y., 644.
Caldwell *vs.* R.R. Co., 84 App. Div., 637.
Campbell *vs.* R.R. Co., 35 Misc., 497; 84 App. Div., 637.
Conabeer *vs.* R.R. Co., 84 Hun, 34; 156 N. Y., 474. 60
Dolan *vs.* R.R. Co., 74 App. Div., 434; 175 N.Y., 367. 111
Ehret *vs.* R.R. Co., 74 App. Div., 628; 175 N.Y., 503.
Fries *vs.* R.R. Co., 57 App. Div., 577; 169 N.Y., 270. 85
Henry *vs.* R.R. Co., 84 App. Div., 637.
Keirns *vs.* R.R. Co., 60 App. Div., 630; 173 N.Y., 642. 109
Ketcham *vs.* R.R. Co., 76 App. Div.,619; 177 N.Y.,247. 113
Kriete *vs.* R.R. Co., 67 App. Div., 620; 175 N. Y., 484. 110
Larney *vs.* R.R. Co., 62 App. Div., 311.
Lewis *vs.* R.R. Co., 25 Misc., 13; 40 App. Div., 343; 162 N. Y., 202. 71
McCarthy *vs.* R.R. Co, 74 App. Div., 629; 175 N. Y., 504.
Mt. Morris Bank *vs.* R.R. Co., 84 App. Div., 637.
Muhlker *vs.* R.R. Co., 60 App. Div., 621; 173 N.Y.,549. 97
Niewenhous *vs.* R.R. Co., 76 App. Div., 619; 177 N.Y., 566.
O'Neil *vs.* R.R. Co., 67 App. Div., 620; 175 N. Y., 484.
Pape *vs.* R.R. Co., 74 App. Div., 175; 175 N. Y., 504.
People *ex rel.* R.R. Co. *vs.* Havemeyer, 47 How. Pr., 494. 34
Sander *vs.* R.R. Co., 42 App. Div., 618.
Sander *vs.* R.R. Co., 58 App. Div., 622.
Scholz *vs.* R.R. Co., 67 App. Div., 620; 175 N. Y., 485.
Siegel *vs.* R.R. Co., 62 App. Div., 290; 173 N. Y., 644.
Tocci *vs.* Mayor, 73 Hun, 46. 51
Talbot *vs.* R.R. Co., 78 Hun, 473; 151 N. Y., 155. 56
Taylor *vs.* R.R. Co., 27 App. Div., 190.
Tynberg *vs.* R.R. Co., 84 App. Div., 637.
Welde *vs.* R.R. Co., 28 App. Div., 379.
Welde *vs.* R.R. Co., 29 Misc., 13; 53 App. Div., 637; 168 N. Y., 597. 80

In People ex rel. N. Y. & H. R. Co. v. *Havemeyer*, the validity of the 1872 enactment was attacked, as and by way of defense against mandamus to compel payment thereunder, the attack adjudged ill-founded, and the validity of the enactment sustained in a judgment rendered by the N. Y. Supreme Court in 1874.

Tocci vs. *Mayor* (73 Hun, 46), was a taxpayer's action to enjoin payment by the city officials in respect of the 1892 structure, the allegation being that the act was unconstitutional, in various respects, and this was adjudged untenable.

The right of the railroad company to maintain and use the railroad structure created and maintained under the 1872 enactment, without being answerable in damages to owners of premises abutting the avenue and street occupied thereby, was called in question and adjudged in favor of the railroad company in *Talbot* v. *Railroad Co.* in trial court December Term, 1893, affirmed by General Term, May Term, 1894 (78 Hun, 473), and affirmed by the Court of Appeals December, 1896 (151 N. Y. 155); and in *Conabeer* v. *Railroad Co.*, in trial court, December, 1893, affirmed by General Term, January, 1895 (84 Hun, 34), and affirmed by the Court of Appeals October, 1898 (156 N. Y. 474).

In like manner the trial court adjudged and the respective reviewing courts of the state have affirmed in this case, as above set forth, that the maintenance and operation of the railroad as existing and in use at the time of the 1892 enactment was rightful as against this plaintiff, and he disentitled to complain thereof or have compensation or damages in respect thereof.

Basis of Judicial Decision.

Comparison of the *Talbot* case (151 N. Y., 155); *Conabeer* case (156 N. Y., 474); *Lewis* case (162 N. Y., 202); *Fries* case (169 N. Y., 270), and the *Muhlker* case (173 N. Y., 549, and this record, pp. 90–100), shows that the different conclusion in the latter cases from that of the *Lewis* case, did not at all result from change of view as to the validity, force or effect of the 1892 enactment, but from reconsideration and rejection of the former view regarding the measure of property right previously parted with by plaintiff and his predecessors in title, and consequent difference in measure and degree to which plaintiff's property rights were subordinate and subject unto public servitude and public regulation in the manner prescribed and provided by the 1892 enactment.

In the *Lewis* case all of the courts held that certain of plaintiff's property had been taken, and adjudged the railroad company liable in the sum of the net increase of injury occasioned by maintenance and use of the 1892 structure over and in excess of that occasioned by the maintenance and use of the 1872 structure.

The Supreme Court, Special Term, and Appellate Division in the *Caldwell*, *Campbell*, *Fries*, *Keirns*, *Kriete*, *Muhlker*, *Niewenhous*, *O'Neil*, *Scholz*, *Siegel* and *Tynberg* cases, adjudged the railroad company liable upon the principle and in

the measure adjudged in the *Lewis* case as above stated; and, in the *Birrell*, *Henry*, *Larney* and *Sander* cases, adjudged the railroad company entitled to maintain and use the two middle tracks at their present grade, and hence liable in the sum of the net increase of injury occasioned by change of the two outermost tracks.

The Court of Appeals in the *Birrell*, *Fries*, *Keirns*, *Kriete*, *Muhlker*, *Niewenhous*, *O'Neil*, *Scholz* and *Siegel* cases, held that none of plaintiff's property had been taken, and adjudged the railroad company not liable in respect of damages occasioned by the 1892 structure and use thereof.

The *Dolan*, *Ehret*, *Ketcham*, *Mt. Morris Bank*, *Pape* and *Welde* cases are in respect of properties opposite that part of the 1892 structure which, to accommodate the station, is of greater width than the 1872 structure was, and in each of these the Court of Appeals reversed the judgment of the lower courts and remanded the cases for trial with reference to such damage as is occasioned by so much of the railroad structure and use as is outside of the lines of the 1872 structure, and as shall be found to be in excess of the railroad right granted by the predecessors in title of or by those complainants.

The features deemed and held to distinguish the cases in reference to properties opposite this greater width railroad structure and operations were (1) that the railroad company's titles, of nature and scope adequate to justify the present railroad structure wholly within the exterior lateral lines of the former structure and operations, as in the case at bar, were not necessarily applicable to or justification of so much of the new structure and use as exceeded the exterior lines of the former; and (2) the State's command and direction of, and for maintenance and use of the station, and, in that behalf of and for maintenance and use of increased width of railroad structure, was not primarily by way of and for improvement of the street for public travel therein, but by way of and for improvement of the facilities, conveniences and accommodations of railroad travel and traffic.

The doctrine of the *Lewis* case was an obvious departure from that of the prior *Talbot* and *Conabeer* cases.

That point of departure was specifically noted and rejected by the Court of Appeals in the *Fries* case. The rule of the *Talbot*, *Conabeer* and *Fries* cases is that of the *Birrell*, *Campbell*, *Dolan*, *Ehret*, *Keirns*, *Ketcham*, *Kriete*, *McCarthy*, *Muhlker*, *Niewenhous*, *O'Neil*, *Pape*, *Scholz*, *Siegel* and *Welde* cases, eighteen in all.

These constitute such well defined and authenticated pronouncement of a settled rule of decision, by the New York State courts, as would show obviously and clearly erroneous

and unwarranted, a ruling to the contrary, by the Federal Courts of original jurisdiction sitting in that State.

With stronger reason, if possible, such pronouncement in this particular case, constitutes the law of this case, which this Court, in the exercise of its limited jurisdiction upon this review, may not rightly thrust aside.

GROUNDS OF DECISION ARE LOCAL PROPERTY LAWS EXISTING PRIOR TO 1892.

The opinions in the *Fries* and *Muhlker* cases present citation, examination and elucidation of, and evince that the conclusions therein announced have their foundations in, rules of property law which have commanded practically unbroken recognition, observance and enforcement since the earliest adjudications constituting the judicial history of the State, and that these rules of property law led to a different conclusion than that announced in the *Lewis* case. In whichsoever case, if either, the judgment is erroneous, the error inheres in and consists of misconception or misapplication of the rules and principles of local property law involved in the question as to whether the plaintiff is the owner of or has a property right in the thing constituting the subject matter of the alleged trespass, by such title as is not subject unto the public servitude which is thereby imposed.

ERROR, IF THERE BE SUCH, INVOLVES NEITHER OF THE FEDERAL QUESTIONS URGED HEREIN.

In neither case does the adjudication at all involve any question as to whether the enactment in question does or does not constitute due process of law for the taking of the property, or does or does not impair the obligations of any contract under which plaintiff claims the property.

The trial court had before it evidence of the character and bounds of railroad possession, occupancy and user prior to, and that subsequent to February, 1897, and evidence of the grants, express and implied, which defendants relied upon to justify as well the present as the former railroad structure and operations; the trial court adjudged these sufficient to justify the former occupancy and use; the Court of Appeals approved that adjudication and further adjudged the same grants sufficient to justify the present structure and operations.

Howsoever the state court may have erred in thus adjudging upon and concerning the rules and principles of local property law, involved in the interpretation of and adjudication upon those grants, the case, nevertheless, fails to present any question of the taking of property without due process of

law, or the impairment of the obligations of contracts under provision whereof complainant claims to have acquired the easements alleged to have been taken.

Damage, Actionable or Non-Actionable.

The distinction between the damage in the one instance deemed to constitute the taking of or trespass upon property, and, as such, actionable, and in the other instance deemed consequential only, and, as such, governed by the doctrine of *damnum absque injuria*, does not of necessity have regard to difference in the nature or character of appropriation or burden to which the physical property is subjected, but may rather have regard to difference in the nature and character of property right by and under which the physical property is held.

As instance the appropriation of complainant's land by permanent flooding thereof as in *Pumpelly* v. *Green Bay Co.* (13 Wall. 166) was not more obvious, palpable and permanent than the appropriation of complainant's land by and for public levees as in *Eldridge* v. *Trezevant* (160 U. S. 452); the invasion of property right and impairment of contract obligation, by appropriation of charter right and power to collect tolls for the use of property as in *Monongahela Nav. Co.* v. *United States* (148 U. S. 312) differed in degree but not in kind from compulsion to share the charter right with a business rival as in *Butchers' Union Co.* v. *Crescent City Co.* (111 U. S., 746).

In the *Pumpelly* and *Navigation Co.* cases the complainants were entitled to compensation because their property was of character and held by title which was not subject, otherwise than upon compensation, to the taking or servitude which the appropriation imposed and effected.

In the *Eldridge* and *Butchers' Union* cases the property right was perfect against all invaders until assertion of the right of servitude and regulation whereunto the title was subject. Assertion and exercise of such right and power of servitude and regulation constituted neither taking nor trespass, because it consisted solely of the exercise of existing legal right.

Case at Bar Unlike Elevated Railroad Cases.

The two features which the courts have recognized and adjudged distinctive between the ordinary elevated railroad structure and operations, and the railroad structure and operations herein complained of, are:

1. Whereas, in the instance of the ordinary elevated railroad the public street was created and existed, and abutters' ease-

ments therein and thereover vested and subsisted all free of and unincumbered by railroad occupancy and user or the right thereof, and in such existing status and exigency the railroad had been built, maintained and operated in such street without consent of or grant by abutting owners; here, the railroad company's exclusive possession, occupancy and user antedating the street opening, and uninterrupted thereby, constituted such continuous exclusion of public street occupancy and user, and such continuous encroachment upon, invasion of and interference with the easements claimed by abutters in, upon and over the same land, that at the time to which judicial inquiry was directed, viz.: that of the alleged trespass, the express and implied grants of abutting owners established the rightfulness, as against them, of the exclusive possession, occupancy and use for railroad purposes of the entire ground over which the present railroad structure and operations extend.

2. Whereas, the legislation under which the ordinary elevated railroad was built, maintained and operated, dealt with streets opened and existing, and abutters' easements therein and thereover vested and subsisting free of and unincumbered by railroad occupancy and uses, or the right thereof; and consisted of the mere public consent to such building, maintenance and operation, and therein diversion of the public street from the originally designated and contemplated user, and conference of charter power for acquiring from the abutting owners the property and property rights requisite and necessary to such construction, maintenance and operation; the legislation here in question dealt with land which, if at all or in any the most barren ideal sense a part of the existing public street, was such only in the sense that, and to the extent and degree that, notwithstanding the intervening sixty years of diverse occupancy and user of the land, there still pertained to it some conceivable remnant of the solely potential public street character which was impressed upon it by and by means of the city map of 1811, the Benson and Poillon maps and deeds of 1825 and 1827, the city and railroad company agreement of 1832, and the 1850–1853 acquirement of the legal title to the land upon nominal consideration (pages 33, 34, 65).

Avowed and Effected Object of 1892 Enactment.

The object avowed and effected by the 1892 enactment was improvement of the facilities of public highway travel and not those of railroad travel. The method and means of such improvement were the State's building of the steel viaduct directly above and over the land, which was rightfully, as against abutters, theretofore and thereunto occupied exclu-

sively by the railroad, at such elevation as would admit of extension and use thereunder of the street surface at approximately then existing grade, and compelling the railroad's use of the viaduct, and thereupon enlarging the usable public street surface to include that thereunto as aforesaid occupied and used exclusively for railroad purposes. The existing viaduct structure was built by the State, railroad operations were transferred thereto and are conducted thereon in obedience to the command of the State, and the former railroad structure, as such, was destroyed by the State in and about extension of the street surface upon and over it, and the existing railroad structure and operations are within the same lateral bounds as had theretofore and thereunto been rightfully as against abutting owners occupied and used exclusively by and for the railroad and its operations.

Consequent Proposition.

Upon the distinction thus recognized and adjudged, is based the further proposition: That public highway abutters' property or property rights in easements of light, air and access, or any or either thereof, in, upon and over a strip of land, between two open, traveled streets, or in such easements in, upon and over a street which is, as against such abutter, rightfully subject unto the maintenance and operation of a four-track railroad in and along the middle three-sevenths of the width of such street, in such-wise as to exclude street occupancy and uses from the land occupied and used by and for the railroad, are, in either such case, in such wise limited and qualified by, and subject unto, the right and power of public regulation of street and railroad, conducive to enlargement of the street and its usefulness for public travel therein, that the reasonable exercise of such power of regulation in and by providing an elevated structure and compelling transfer thereto of operations of the four-track railroad, over the same land previously occupied and used exclusively for railroad purposes, is governed by the doctrine of *damnum absque injuria*, in that the damage, if any, thereby occasioned to such easement, is not actionable, because not occasioned by transcendence of the combined legal right of the State and the railroad company as against plaintiff, nor by breach of any legal duty owed by either the State or the railroad company to plaintiff.

Judgment Herein Proceeded on Rules of Law, Observance Whereof Preceded 1892 Enactment.

The hearing invoked by and had upon plaintiff's complaint, as also the evidence adduced *pro* and *con*, and the principles

and processes of reasoning, leading to the conclusions and judgment announced, have all proceeded within and upon the lines of, and subject to the governance of, rules of property law and rules of procedure in respect of character of hearing and grounds of determination, inhering in the general laws of the State, judicial observance whereof long antedated the 1892 enactment.

Neither in and by provision of that enactment, nor in and by application, interpretation or administration thereof in this action, has plaintiff's property or his complaint in respect of alleged taking thereof or of trespass thereon been subjected to or restricted by any new, unusual or exceptional rule of property or process.

By and upon process and procedure invoked by plaintiff, exercised and administered in conformity with long time established and uniformly observed rules of local property law, the State courts have considered and adjudged that the public regulation and carrying into effect thereof, of which plaintiff complains, did not take or trespass upon any property of plaintiff; that if and in so far as the fee, or usable value, of his property is thereby diminished, such diminution is consequential to and upon the lawful exercise of the public right of servitude and public right and power of regulation subject unto which his property was and is held, and hence gives rise to no right of action.

In all this the State courts but administered and adjudged the well-authenticated and long-time-followed rules of process and procedure, and of local property law, which in no wise involved inquiry or adjudication, regarding or in respect of conferrence by the 1892 enactment, of the right and power of the State, or of defendants herein, to take or trespass upon property without compensation, without due process of law, or by impairment of contract obligations.

Therein and thereby the 1892 enactment was accorded and given its purported function and operation as and being a public regulation of public highway and railroad promotive of and conducive to public accommodation, convenience and safety, in the exercise of public highway rights and uses, and thereunto subjection of property held subject unto lawful exercise of that right and power.

That enactment was not given force or effect as or by way of shield or protection against liability in respect of any taking of property, or of any trespass upon property, or of any impairment, contravention or breach of contract obligation.

The local rules of process and procedure and of local property law therein and thereby administered and adjudged as and constituting the foundation of the judgment against the plaintiff and in favor of the defendants, are binding upon, and not subject unto the review and revision of this Court.

Failure of Plaintiff's Case Has Not Resulted from Want of Due Process of Law.

The plaintiff has invoked and had orderly and full hearing preliminary to, and thereupon adjudication by the state courts of competent jurisdiction over the subject matter of his complaint. The conclusion and adjudication against him are based upon the finding that plaintiff and his predecessors in title had either never possessed or had granted away the property rights, the alleged deprivation of which constitutes the gravamen of his complaint. It follows that the judgment, howsoever, if at all, erroneous, is not subject unto the criticism of lack of due process of law.

In *Davidson* v. *New Orleans* (96 U. S. 97), error to the Supreme Court of Louisiana, involving the validity of a local assessment, Mr. Justice Miller, writing for the Court said:

> "The objections raised in the State Courts to the assessments were numerous and varied, including constitutional objections to the statute under which the assessment was made, and alleged departures from the requirements of the statute itself. And although counsel for the plaintiff in error concede, in the first sentence of their brief, that the only Federal question is whether the judgment is not in violation of that provision of the Constitution which declares that no State shall deprive any person of life, liberty or property without due process of law, the argument seems to suppose that this court can correct any other error which may be found in the record" (p. 99).
>
> "In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." (p. 104.)
>
> "As contributing to some extent, to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition, as applicable to the case before us:
>
> "That whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate

to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

"It may violate some provision of the State Constitution against unequal taxation; but the Federal Constitution imposes no restraints on the States in that regard. If private property be taken for public uses without just compensation, it must be remembered that, when the fourteenth amendment was adopted, the provision on that subject, in immediate juxtaposition in the fifth amendment with the one we are construing, was left out, and this was taken. It may possibly violate some of those principles of general constitutional law, of which we could take jurisdiction if we were sitting in review of a Circuit Court of the United States, as we were in *Loan Association* v. *Topeka* (20 Wall. 655). But however this may be, or under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." (pp. 104, 105).

Missouri Pacific Railway Co. v. *Humes* (115 U. S., 512), error to the Supreme Court of Missouri, was an action under a State statute to recover double damages for the killing of a mule.

Mr. Justice Field, writing for the Court, said:

"If the laws enacted by a State be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice, and oppressive character of such laws will not invalidate them as affecting life, liberty or property without due process of law." * * * "It is hardly necessary to say, that the hardship, impolicy, or injustice of State laws is not necessarily an objection to their constitutional validity; and that the remedy for evils of that character is to be sought from State legislatures. Our jurisdiction cannot be invoked unless some right claimed under the Constitution, laws, or treaties of the United States is invaded. This court is not a harbor where refuge can be found from every act of ill-advised and oppressive State legislation." (pp. 520, 521.)

Marchant v. *Pennsylvania Railroad Co.* (153 U. S., 380), error to the Court of Common Pleas, No. 3, for the County of Philadelphia, State of Pennsylvania, was an action for damages occasioned by an elevated road on railroad ground abutting the south side of a street, having a width of fifty-one feet, and opposite plaintiff's property abutting the north side of the street.

The trial resulted in a verdict and judgment for plaintiff for $4,980, which the State Supreme Court reversed, the majority of that Court holding that plaintiff had no cause of action.

Mr. Justice Shiras, writing for this Court, said:

"In reaching the conclusion that the plaintiff, under the admitted facts in the case, had no legal cause of action, the Supreme Court of Pennsylvania was called upon to construe the laws and constitution of the State. The plaintiff pointed to the 10th section of article 1 of the constitution, which provided that 'private property shall not be taken or applied to public use, without authority of law, and without just compensation being first made or secured;' and to the 8th section of article 16, which contains the following terms: 'Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury or destruction.'

"The first proposition asserted by the plaintiff, that her private property has been taken from her without just compensation having been first made or secured, involves certain questions of fact. Was the plaintiff the owner of private property, and was such property taken, injured, or destroyed by a corporation invested with the privilege of taking private property for public use? The title of the plaintiff to the property affected was not disputed, nor that the railroad company was a corporation invested with privilege of taking private property for public use. But it was adjudged by the Supreme Court of Pennsylvania that the acts of the defendant which were complained of did not, under the laws and constitution of that State, constitute a taking, an injury, or a destruction of the plaintiff's property.

"We are not authorized to inquire into the grounds and reasons upon which the Supreme Court of Pennsylvania proceeded in its construction of the statutes and constitution of that State, and if this record presented no other question except errors alleged to have been committed by

that court in its construction of its domestic laws, we should be obliged to hold, as has been often held in like cases, that we have no jurisdiction to review the judgment of the state court, and we should have to dismiss this writ of error for that reason.

"*But we are urged to* sustain and exercise our jurisdiction in this case because it is said that the plaintiff's property was taken 'without due process of law,' and because the plaintiff was denied 'the equal protection of the laws,' and these propositions are said to present Federal questions arising under the Fourteenth Amendment of the Constitution of the United States, to which our jurisdiction extends.

"It is sufficient for us in the present case to say that, even if the plaintiff could be regarded as having been deprived of her property, the proceedings that so resulted were in 'due process of law.'

"The plaintiff below had the benefit of a full and fair trial in the several courts of her own State, whose jurisdiction was invoked by herself. In those courts her rights were measured, not by laws made to affect her individually, but by general provisions of law applicable to all those in like condition." (pp. 384–386.)

In *Remington Paper Company* v. *Watson*, (173 U. S. 443), error to the Supreme Court of Louisiana, the plaintiff, upon its own application, litigated its rights in the Louisiana State Courts.

Mr. Justice McKenna, writing for the Court, says:

"The action was regularly proceeded with, and was determined against plaintiff in error on grounds which did not involve Federal questions, and therefore it is not within our power to review the judgment of the Supreme Court of the State.

"The plaintiff in error thus sought in the state court, and was given an opportunity, to litigate the rights claimed by it, and it cannot complain that the guarantees of the Constitution of the United States were denied because the litigation did not result successfully." (p. 451.)

POINT II.

Where a property or property right is vested subject unto the right and power of police regulation or public servitude, contract obligation in respect of such property or property right cannot be relied upon to oust or terminate the exercise of the right of such regulation or servitude.

In *Presbyterian Church* v. *Mayor of New York*, (5 Cowen, 538), the corporation of the City of New York had conveyed lands for the purposes of a church and cemetery, with a covenant for quiet enjoyment; and afterwards, pursuant to a power granted by the legislature, passed a by-law prohibiting the use of these lands as a cemetery; the plaintiff alleged breach of the covenant and prayed damages. The defendant pleaded the act of the legislature and by-law in bar of the action, and the plaintiff demurred to that plea: *Held*,

> "The principal question, and the only one which it is necessary to decide, is, whether the by-law of October, 1823, is, *per se*, a violation of the covenant for quiet enjoyment, contained in the deed of the 25th February, 1766, for which the defendants are liable to pay damages.
>
> "The validity of the by-law is asserted by both parties. We are relieved, therefore, from any inquiry on that point.
>
> "The defendants are a corporation, and in that capacity are authorized by their charter, and by-law, to purchase and hold, sell and convey real estate, in the same manner as individuals. They are considered a person in law within the scope of their corporate powers; and are subject to the same liabilities, and entitled to the same remedies, for the violation of contracts, as natural persons. They are also clothed, as well by their charter as by subsequent statutes of the state, with legislative powers; and, in the capacity of a local legislature, are particularly charged with the care of the public morals, and the public health within their own jurisdiction.
>
> "In ascertaining their rights and liabilities as a corporation, or as an individual, we must not consider their legislative character. They had no power as a party, to make a contract which should control or embarrass their legislative powers and duties. Their enactments, in their legislative capacity, are to have the same effect upon their individual acts, as upon those of any other persons, or the public at large, and no other effect.

"The liability of the defendants, therefore, upon the covenant in question, must be the same as if it had been entered into by an individual; and the effect of the by-law upon it the same as if that by-law had been an act of the state legislature. It is expressly authorized by the legislature; and whether it be their act or an act of the local city legislature, makes no difference. (4 Wheat. 652.)

"The plaintiffs, then, are entitled to the same remedy as if the premises had been conveyed to them by an individual, under the like conditions and covenants. This being so, the defendant's proposition is, that the act of the legislature rendering the covenant unlawful, the covenant itself becomes inoperative. * * *

"In 1 Salk. 198, where the same case is reported, the proposition is thus stated: 'Where H covenants not to do an act or thing which was lawful to do, and an act of parliament comes after and compels him to do it, the statute repeals the covenant. So if H covenants to do a thing which is lawful, and an act of parliament comes in and hinders him from doing it, the covenant is repealed. But if a man covenants not to do a thing which then was unlawful, and an act comes and makes it lawful to do it, such act of parliament does not repeal the covenant.'

"That such is the correct rule, as between individuals, seems to be admitted by the counsel for the plaintiffs. But it is contended that the rule is not applicable to a case, where the same party makes the covenant, and afterwards makes the legislative act, which abrogates the covenant. There is, indeed, a seeming inconsistency; but the solution has already been given, viz., that the defendants had no power to limit their legislative discretion by covenant; and they are not estopped from giving this answer." (pp. 540–542.)

In *Coates* v. *Mayor*, (7 Cowen, 584), the validity of the same by-law was contested by way of opposition to enforcement of the penalty therein prescribed. The substance of the holdings of the court is stated in the marginal note as follows:

"A statute (2 R. L. 445, s. 267,) declared to be a public act, authorized the corporation of the city of New York to make various by-laws, when they should deem them necessary and proper: 'and for regulating, or if they find it necessary, preventing the interment of the dead,' within the city. The corporation passed a by-law prohibiting the interment of dead within certain parts of the city, under a penalty; notwithstanding which certain persons interred dead bodies in the part of the city to which the by-law related; the interment was by persons

having a right under grants of, or titles to land holden in trust for the sole purpose of interment, some of which had been used for that purpose for more than a century, and to some of which certain fees for interment were incident, and belonged to the persons interring. A further right was also claimed by individual vault owners, in whose behalf some of the interments were made.

Held, that the by-law was valid and operative as to all these interments.

The act under which it passed is not unconstitutional, either as impairing the obligation of contracts, or taking private property for public use, without compensation; but stands on the ground of being an authority to make police regulations in respect to nuisances.

Held, that the by-law need not recite or adjudge, on its face, that it was necessary; but such necessity was implied by the act of passing it.

Held, also that a declaration for the penalty of the by-law need not aver that such by-law was necessary.

Necessity, as intended by the statute, is nearly synonymous with *expediency*, or what is necessary for the public good.

Held, that the length of time, 100 years, during which part of the premises in question had been used for interring the dead, was not conclusive against the power of the legislature, or the corporation, to pass the laws.

Held, also, that though premises be granted for a certain purpose, and long used for that purpose, this will not prevent the use afterwards being treated as a public nuisance.

Though a corporation grant lands for the purpose of interment, and even covenant that they shall be quietly enjoyed for that purpose, they are not thereby estopped afterwards to pass a by-law forbidding such interment, under a penalty.

Such a by-law repeals the covenant.

Semb., the powers of the corporation of the city of New York, depends on statute which has superseded their original charter, especially as to those things in relation to which the statute makes provisions, either agreeing with or differing from the charter."

To the like effect is the case of *Gushee* v. *City of New York*, (42 App. Div. 37), the nature of the case and points adjudged being recited in the head note as follows :

"The department of parks of the city of New York in executing a contract by which it grants the privilege of maintaining a restaurant in a building owned by the city

and located in one of its public parks, at a stipulated monthly rental, acts in a private and not in a governmental capacity.

"The fact that the privilege is granted for a fixed period of five years does not render the contract void as a matter of law, upon the ground that it constitutes an attempted abdication by the department of parks of its power to continuously exercise its discretion in the management of the park.

"Where such a contract provides that the privilege granted shall be subject to all rules, regulations and ordinances then or thereafter prescribed by the department of parks relating to the conduct of the privileges granted and to the general management and government of the park, the licensee is entitled to the undisturbed enjoyment of his privilege so long as there is no regulation necessarily interfering with the conduct of the restaurant, and so long as the department of parks deems it best that a restaurant shall be maintained therein.

"If, however, the department of parks shall, at any future time, determine in good faith to discontinue the restaurant, the licensee's privilege will terminate.

"*Semble*, that this would be true even were there no provision in the contract making it subject to any regulations or ordinances which the department might subsequently see fit to enact."

Upon this principle, this court, in *Butchers' Union Co.* v. *Crescent City Co.* (111 U. S., 746), sustained as being a rightful exercise of police power, the state grant of corporate power and privilege to the *Butchers' Union Company* which contravened the exclusive rights and privileges which previous legislation purported to vest in the *Crescent City Company*, and which previous legislation had been adjudged valid by this court in the *Slaughter House* cases (16 Wall. 36).

CONTRACT OBLIGATION IS DEEMED SUBJECT UNTO STATE'S RIGHT OF POLICE POWER.

The city corporation and the railroad company were and are the creatures of the State. As to each, the State has at all times possessed the right and power of amendment and alteration of their respective charter powers. Neither could by entering into contract obligation with or to plaintiff's predecessors in title deprive the State of, or cripple its exercise of, the right and power to regulate the street and railroad conducive to enlargement of the usefulness of the street in and for its primary purposes; or deprive the State of the right and power to itself, or by a corporation created for the purpose,

build, maintain and operate, upon a line selected by either, a railroad for common carrier service, upon payment of compensation for and thereby acquirement of the land requisite and used therefor. Any contract with either corporation must, as matter of law, be deemed to have been entered into with knowledge of and regard to such right and power of the State, and to intend that obedience to the direction or command of the State in contravention of the letter of the obligation shall not be accounted a breach of the obligation.

Contention to the contrary is to say that the creature of the State may do what the State itself may not do, to wit, by contract restrict the State in the right of exercise of its police power.

An enactment in such case prescribing police regulation in contravention of the terms of the contract, is not nullified by the federal constitution inhibition of impairment of the obligation of the contract.

Lord vs. *Thomas*, 64 N. Y. 107.
Brown vs. *Colorado*, 106 U. S. 95.
Pennsylvania College Cases, 13 Wall. 190.
Chicago, &c., R. R. Co. vs. *Nebraska*, 170 U. S. 57.

The holdings of the state court that, as against plaintiff, the state possessed the right and power of such regulation of street and railroad maintenance and use as was prescribed by and carried into effect in pursuance of the 1892 enactment, and that consequential damage and loss thus occasioned was governed by the doctrine of *damnum absque injuria*, viewed in the light of the proofs and findings as to the origin, history and character of street and railroad maintenance and use to which those easements were incident, evinces that as matter of local property law pertinent thereto, those easements, if at all owned by plaintiff, were deemed to be held not by title absolute, but subject unto the impress of the right and power of state regulation and servitude such as was therein exercised.

In *Goszler* v. *The Corporation of Georgetown*, (6 Wheat. 593), the corporation having been given the power to graduate the streets, exercised that power in and by establishing a grade prescribed by an ordinance of May, 1799. In September, 1816, it passed an ordinance directing alteration of the grade, and plaintiff, an abutting owner, sought to enjoin enforcement thereof.

The contention was that the power was not a continuing power, and that "the ordinance of May, 1799, is in the nature of a compact and is unalterable." (p. 593.)

Marshall, *C. J.* "The second point presents a question of some difficulty. One object of the ordinance probably

was, to give as much validity to the graduation made by the commissioners, as if it had been made under the direct superintendence of the corporate body. But it cannot be disguised, that a promise is held forth to all who should build on the graduated streets, that the graduation should be unalterable. The court, however, feels great difficulty in saying that this ordinance can operate as a perpetual restraint on the corporation.

"When a government enters into a contract, there is no doubt of its power to bind itself to any extent not prohibited by its constitution. A corporation can make such contracts only as are allowed by the acts of incorporation The power of this body to make a contract which should so operate as to bind its legislative capacities forever thereafter, and disable it from enacting a by-law, which the legislature enables it to enact, may well be questioned. We rather think that the corporation cannot abridge its own legislative power." (pp. 597, 598.)

In *Stone* vs. *Mississippi*, (101 U. S., 814), Waite, *C. J.*, at page 817, says:

"All agree that the legislature cannot bargain away the police power of a State. 'Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police.'"

Pennsylvania College Cases, (13 Wall. 190), error in three suits to the Supreme Court of Pennsylvania, argued and adjudged together, involved validity of an enactment which it was contended impaired the obligation of a contract.

"Whether the act of Assembly in question in this case is or not repugnant to the constitution of the State is conclusively settled against the complainants by the decision in this very case, and the question is not one open to re-examination in this court, as it is not one of Federal cognizance in a case brought here by a writ of error to a State court. Nothing, therefore, remains to be examined but the second question presented in the pleadings, which is, whether the supplementary act of Assembly uniting the two institutions and providing that there should be but one location of the same for any purpose, impairs the obligation of the contract between the State and the corporation of Jefferson College, as created by the original charter; or, in other words, whether it is repugnant to

the tenth section of the first article of the Federal Constitution." (p. 212.)

* * * * *

"Such contracts were made with the trustees and not with the State, and it is a mistake to suppose that the existence of such a contract between the corporation and an individual would inhibit the legislature from altering, modifying, or amending the charter of the corporation by virtue of a right reserved to that effect, or with the assent of the corporation, if, in view of all the circumstances, the legislature should see fit to exercise that power." (p. 222.)

In *Eldridge* v. *Trezevant* (160 U. S. 452), the plaintiff, a citizen of another State and grantee of the United States, complained of the taking of his land without compensation for use as and for a public levee.

This court followed the state law and state court decisions in holding the lands lawfully subject unto this servitude, and that such appropriation thereof was *damnum absque injuria.*

In *Meyer* v. *Richmond* (172 U. S. 82), Mr. Justice McKenna, writing for the court at page 94 *et seq.*, says:

"The petition submitted for decision the power of the city of Richmond to make or authorize the obstruction complained of under its charter, and the constitution and laws of Virginia as well as the prohibition of the Constitution of the United States. If the decision necessarily passed on and denied the latter as we hold it did, and hence entertain jurisdiction to review its judgment, it necessarily passed on and denied the former. If under the constitution and laws of Virginia whatever detriment he suffered was *damnum absque injuria*, he cannot be said to have been deprived of any property.

* * * * * * *

"The substantial thing is not that one may be damaged by an obstruction in a street—not that one may be specially damaged beyond others, but is such damage a deprivation of property within the meaning of the constitutional provisions? According to the Virginia cases an additional servitude may be said to be another physical appropriation, and hence another taking, and must be compensated. But the plaintiff's case is not within this doctrine, nor is there anything in the decisions of Virginia which makes consequential damages to property a taking within the meaning of the constitution of that State. Decisions in other States we need not resort to or review. Those of this court furnish a sufficient guide."

POINT III.

"State decisions construing the State statute of limitations in respect to real property, and declaring what constitutes adverse possession, and the effect thereof, when continued for the period of limitation, constitute a rule of property binding upon the federal courts of law and in equity in adjudicating upon titles to land within that State."

Elder v. *McClaskey* (17 C. C. A. 251), and certiorari denied (163 U. S. 685), and cases cited in opinion by Taft, Circuit Judge.

Lobenstine v. *Union El. R. Co.*, 80 Fed., 9; 25 C, C. A., 304.

Shelby v. *Guy* (11 Wheat. 361), involved the question of the effect of the words, "persons beyond seas," in a state statute of limitations, as applied to persons in another colony or state in America.

JOHNSON, *J.*: "That the statute law of the States must furnish the rule of decision to this Court, as far as they comport with the constitution of the United States, in all cases arising within the respective States, is a position that no one doubts. Nor is it questionable that a fixed and received construction of their respective statute laws in their own courts makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction. It is obvious that this admission may, at times, involve us in seeming inconsistencies; as, where States have adopted the same statutes, and their courts differ in the construction. Yet that course is necessarily indicated by the duty imposed on us, to administer, as between certain individuals, the laws of the respective States, according to the best lights we possess of what those laws are." (p. 367.)

Green v. *Neal* (6 Pet. 291), involved application of the statute of limitations of Tennessee in determining the question of title to real estate.

MCLEAN, *J.* (p. 297): "In a great majority of the causes brought before the federal tribunals, they are called to enforce the laws of the states. The rights of parties are determined under those laws, and it would be a strange perversion of principle if the judicial exposition of those laws, by the state tribunals, should be disregarded. These ex-

positions constitute the law and fix the rule of property. Rights are acquired under this rule, and it regulates all the transactions which come within its scope,

"It is admitted in the argument that this Court, in giving a construction to a local law, will be influenced by the decisions of the local tribunals; but, it is contended, that when such a construction shall be given in conformity to those decisions, it must be considered final. That if the state shall change the rule it does not comport either with the consistency or dignity of this tribunal to adopt the change. Such a course, it is insisted, would recognize in the state courts a power to revise the decisions of this court and fix the rule of property differently from its solemn adjudications. That the federal court, when sitting within a state, is the court of that state, being so constituted by the constitution and laws of the Union; and, as such, has an equal right with the state courts to fix the construction of the local law.

"On all questions arising under the constitution and laws of the Union this court may exercise a revising power, and its decisions are final and obligatory on all other judicial tribunals, state as well as federal. A state tribunal has a right to examine any such questions and to determine them, but its decision must conform to that of the supreme court, or the corrective power may be exercised. But the case is very different where a question arises under a local law. The decision of this question, by the highest judicial tribunal of a state, should be considered as final by this court; not because the state tribunal, in such a case, has any power to bind this court, but because in the language of the court, in the case of Shelby *et al.* v. Guy, 11 Wheat. 361, 'a fixed and received construction by a state, in its own courts, makes a part of the statute law.'

"The same reason which influences this court to adopt the construction given to the local law, in the first instance, is not less strong in favor of following it in the second, if the state tribunals should change the construction. A reference is here made, not to a single adjudication, but to a series of decisions which shall settle the rule. Are not the injurious effects on the interests of the citizens of a State as great, in refusing to adopt the change of construction, as in refusing to adopt the first construction? A refusal in the one case as well as in the other has the effect to establish, in the State, two rules of property.

"Would not a change in the construction of a law of the United States, by this tribunal, be obligatory on the State courts? The statute, as last expounded, would be the

law of the Union; and why may not the same effect be given to the last exposition of a local law by the state court? The exposition forms a part of the local law, and is binding on all the people of the State, and its inferior judicial tribunals. It is emphatically the law of the State, which the federal court, while sitting within the State, and this court, when a case is brought before them, are called to enforce. If the rule as settled should prove inconvenient or injurious to the public interests, the legislature of the State may modify the law or repeal it.

"If the construction of the highest judicial tribunal of a State form a part of its statute law, as much as an enactment by the legislature, how can this court make a distinction between them? There could be no hesitation in so modifying our decisions as to conform to any legislative alteration in a statute; and why should not the same rule apply where the judicial branch of the state government, in the exercise of its acknowledged functions, should, by construction, give a different effect to a statute, from what had at first been given to it? The charge of inconsistency might be made with more force and propriety against the federal tribunals for a disregard of this rule, than by conforming to it. They profess to be bound by the local law; and yet they reject the exposition of that law which forms a part of it. It is no answer to this objection that a different exposition was formerly given to the act which was adopted by the federal court. The inquiry is, what is the settled law of the State at the time the decision is made? This constitutes the rule of property within the State, by which the rights of litigant parties must be determined.

"As the federal tribunals profess to be governed by this rule, they can never act inconsistently by enforcing it. If they change their decision, it is because the rule on which that decision was founded has been changed." (pp. 297–300.)

Livingston v. *Moore* (7 Pet., 469), error to the Circuit Court, involved validity of a statute enacted to prescribe a method of enforcing the lien of the State upon the lands of its debtors.

JOHNSON, *J.*: "Now the relation in which our circuit courts stand to the States in which they respectively sit and act, is precisely that of their own courts, especially when adjudicating on cases where state lands or state statutes come under adjudication. When we find principles distinctly settled by adjudications, and known and acted upon as the law of the land, we have no more right

to question them, or deviate from them, than could be correctly exercised by their own tribunals" (p. 542). * * * "The rule of law being once established by the highest tribunal of a State, courts which propose to administer the law as they find it, are ordinarily bound, *in limine*, to presume that, whether it appears from the reports or not, all the reasons which might have been urged, *pro* or *con*, upon the point under consideration, had been examined and disposed of judicially." (p. 543.)

Leffingwell vs. *Warren* (2 Black, 599), error to the District Court of the United States for the District of Wisconsin, the error upon which the judgment was reversed was that the trial court had not followed the State courts' interpretation of the statute of limitations.

Mr. Justice Swayne, writing for this Court (page 603), says:

"The Courts of the United States, in the absence of legislation upon the subject by Congress, recognize the Statutes of Limitations of the several States, and give them the same construction and effect which are given by the local tribunals. They are a rule of decision under the 34th section of the Judicial Act of 1789.

"The construction given to a statute of a State by the highest judicial tribunal of such State, is regarded as a part of the statute, and is as binding upon the Courts of the United States as the text. * * *

"If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decisions, this Court will follow the latest settled adjudications. * * *

"The equities in behalf of the plaintiff below, are strong. We have all felt their force. Without any fault on his part, he has been divested of the title to his land. But our duty is to apply the law—not to make it. If this statute be unwise or unjust the remedial power lies with the Legislature of the State, and not with this Court."

Tioga Railroad v. *Blossburg, etc., Railroad* (20 Wall. 137), involved the question of the right of the Tioga Railroad Company, a foreign corporation, to avail itself of the New York Statute of Limitations.

"The counsel for the plaintiff in error (the defendant below) insists 'that it was proved and conceded that during all the time of the existence of the contract of 1851, the defendant had property within the State of New York, an office at Corning, New York, directors, officers, and agents, constantly within this State, and at all times amenable to the process of its courts; and, in fact,

in 1855, the plaintiff availed itself of this condition of things by bringing a suit against the defendant for a portion of the demand claimed under the contract now in controversy, recovered judgment and collected the same, and that in fact this suit was commenced by personal service of a summons upon the defendant's agent at Corning; and that it is, therefore, apparent that the Tioga company has been, at all times, subject to a suit at law for any debt it owed to the Blossburg company or any other party,' and he argues that the statute of limitations is therefore a defense.

If the facts appeared as stated by the counsel, it could not avail the plaintiff in error. The courts of New York have decided (and two of the decisions were made upon the case of this very company), that a foreign corporation cannot avail itself of the statute of limitations of that State. And this notwithstanding the defendant was the lessee of a railroad in New York, and had property within the State, and a managing agent residing and keeping an office of the company at Elmira, within the State. These decisions upon the construction of the statute are binding upon us, whatever we may think of their soundness on general principles." (p. 143.)

POINT IV.

State Court decisions in respect of property having its situs therein, and in respect of thereto appurtenant rights and liabilities, whether founded upon the State Constitution, statute or common law, constitute a rule of property binding upon the federal courts adjudicating upon titles, rights or liabilities pertaining to such property in that State.

Subject only to a well-founded exception obviously foreign to the case at bar, the binding force of the rules of local property law as recognized and administered in the courts of the respective States, as well in the construction of State Statutes as also in the application of common-law principles, is so uniformly observed and numerously illustrated in the adjudications of this court as to render uncalled for any general reference to the cases.

Brief reference to a very few of them will serve to exhibit the reasons and principles upon which those local property

rules are held to control as constituting indeed the administration of the law of the respective State.

Walker v. *State Harbor Commissioners* (17 Wall. 648), involved title to lands, adjudication whereof proceeded upon construction of a state statute relative to "tide lands."

> Mr. Justice FIELD: "It is not for us to express any opinion as to what would be our construction of the act had the Supreme Court of the State never spoken on the subject. In the construction of the statutes of a State, and especially those affecting titles to real property, where no Federal question arises, this court follows the adjudications of the highest court of the State. Its interpretation is accepted as the true interpretation, whatever may be our opinion of its original soundness. It becomes a part of the statute, as much so as if incorporated into the body of it, and in following the statute as thus interpreted we only apply to a local question the law of the place. As has been often remarked, infinite mischiefs would result if, in construing State statutes affecting titles to real property, where no Federal question is involved, a different rule were adopted by the Federal tribunals from that of the State courts." (p. 651.)

Townsend v. *Todd*, (91 U. S. 452), involved the validity of a mortgage as affected by the construction placed upon the State recording acts.

> "In most of the States, a mortgage like the one before us, reciting a specific indebtedness, but given in fact to secure advances or indorsements thereafter to be made, is a valid security, and would be good to secure the $6,000 actually advanced before other incumbrances were placed upon the property. 11 Ohio, St. 232; 12 id. 38; 34 N. Y. 307; 35 id. 500; 22 id. 380; 2 Sand. Ch. 78; 6 Duer, 208. We should be quite willing to give the appellant the benefit of this principle to the extent of his actual advances; but the contrary rule seems to be so well settled in Connecticut, that we are not at liberty to do so. The decree below vacating and cancelling the appellant's mortgage, being in conformity with that rule, is *Affirmed*." (pp. 453, 454.)

Detroit v. *Osborne*, (135 U. S. 492), error to the United States Circuit Court, was an action for damages occasioned by a defective sidewalk.

> Mr. Justice BREWER: "This contention suggests two inquiries: First, What is the settled law of Michigan? and Second, If it be as claimed, is it binding upon the federal courts?" (p. 495.)

"The second inquiry must be answered in the affirmative. If it is a matter of local law, that law is obligatory upon the federal courts. It must be conceded that this adjudication as to the liability of a city for injuries caused by a defect in the sidewalks, the repair of which it has both the power and duty to provide for, is not in harmony with the general rule in this country, 2 Dillon on Mun. Corp. 3d ed. Secs. 1017, 1018; nor in accord with the views expressed by this court. In *Barnes v. The District of Columbia*, 91 U. S. 540, this court, after referring to the case from 21 Michigan, *supra*, and the doctrine stated therein, observed that 'the authorities establishing the contrary doctrine, that a city is responsible for its mere negligence, are so numerous and so well considered that the law must be deemed to be settled in accordance with them,' citing in support a long list of authorities. The authorities which support a different view are collected in *Hill* v. *Boston*, 122 Mass. 344. But even if it were a fact that the universal voice of the other authorities was against the doctrine announced by the Supreme Court of Michigan, the fact remains that the decision of that court, undisturbed by legislative action, is the law of that State. Whatever our views may be as to the reasoning or conclusion of that court, is immaterial. It does not change the fact that its decision is the law of the State of Michigan, binding upon all its courts, and all its citizens, and all others who may come within the limits of the State. The question presented by it is not one of general commercial law; it is purely local in its significance and extent. It involves simply a consideration of the powers and liabilities granted and imposed by legislative action upon cities within the State. While this court has been strenuous to uphold the supremacy of federal law, and the interpretation placed upon it by the federal courts, it has been equally strenuous to uphold the decisions by state courts of questions of purely local law. There should be, in all matters of a local nature, but one law within the State; and that law is not what this court might determine, but what the Supreme Court of the State has determined. A citizen of another State going into Michigan may be entitled under the federal Constitution to all the privileges and immunities of citizens of that State; but under that Constitution he can claim no more. He walks the streets and highways in that State, entitled to the same rights and protection, but none other, than those accorded by its laws to its own citizens.

"This question is not a new one in this court. In the case of *Claiborne County* v. *Brooks*, 111 U. S. 400, 410, it

was held that, 'when the settled decisions of the highest court of a State have determined the extent and character of the powers which its political and municipal organizations may possess, the decisions are authoritative upon the courts of the United States;' and in the opinion it was observed: 'It is undoubtedly a question of local policy with each State what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State.'

"What was there decided in reference to the powers is equally true as to the liabilities of a municipal corporation. The city of Detroit, in the discharge of its public duty in respect to keeping the streets and sidewalks in repair, is under no higher or different obligation to a citizen of Ohio than to one of the State of Michigan, and the measure of its liability under the statutes, as stated, is to be determined by the judgment of the Supreme Court of that State, and not by what our opinions might be as to the proper construction of those statutes. Reference may also be made to the recent case of *Bucher* v. *Railroad Company*, 125 U. S. 555, 584, in which this court followed, against its own judgment of the law, the rulings of the Supreme Court of Massachusetts, and held that a party traveling on Sunday, and not for necessity or charity, in the cars of a railroad company, could not recover for injuries sustained by the negligence of the company, because he was himself thus violating the law of the State. Concluding the opinion of the court in that case, it is observed: 'It may be said generally that whenever the decisions of the State courts relate to some law of a local character, which may have become established by those courts, or has always been a part of the law of the State, that the decisions upon the subject are usually conclusive, and always entitled to the highest respect of the federal courts. The whole of this subject has recently been very ably reviewed in the case of *Burgess* v. *Seligman*, 107 U. S. 20. Where such local law or custom has been established by repeated decisions of the highest courts of a State, it becomes also the law governing the courts of the United States sitting in that State," (pp. 497–500.)

In *N. Y. & N. E. Railroad Co.* v. *Bristol* (151 U.S. 556), error to the Supreme Court of Errors of the State of Connecticut, the railroad company challenged the validity of an enactment

relating to grade crossings as depriving it of the equal protection of the laws.

Mr. Chief Justice FULLER:

"It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury. (p. 567.)

"We are asked upon the grounds above indicated to adjudge that the highest tribunal of the State in which these proceedings were had, committed, in reaching these conclusions, errors so gross as to amount in law to a denial by the State of rights secured to the company by the Constitution of the United States, or that the statute itself is void by reason of infraction of the provisions of that instrument.

"But this court cannot proceed upon general ideas of the requirements of natural justice apart from the provisions of the Constitution supposed to be involved, and in respect of them we are of opinion that our interposition cannot be successfully invoked.

"As observed by Mr. Justice Miller in *Davidson* v. *New Orleans*, 96 U. S. 97, 104, the Fourteenth Amendment cannot be availed of 'as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in the state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.' To use the language of Mr. Justice Field, in *Missouri Pacific Railway* v. *Humes*, 115 U. S. 512, 520, 'it is hardly necessary to say, that the hardship, impolicy or injustice of state laws is not necessarily an objection to their constitutional validity: and that the remedy for evils of that character is to be sought from state legislatures.'" (p. 570.)

Sioux City Railroad Co. v. *N. A. Trust Co.*, (173 U. S., 99), certiorari to the Circuit Court of Appeals, presented the question whether bonds, issued by an Iowa corporation in excess of its charter powers, were enforceable against it.

Mr. Justice White, following an examination of the course of decisions upon the question in the Iowa State Courts, says:

> "Whether, as an independent question, if we were enforcing the Iowa statute, we would decide that the issue of stock by a corporation in excess of a statutory inhibition was not void but merely voidable, need not be considered, since, as we have said, in applying an Iowa law, we follow the settled construction given to it by the Supreme Court of that State." (pp. 112, 113.)

Wade v. *Travis County*, (174 U. S., 499), certiorari to the Circuit Court of Appeals for the fifth circuit, was brought to recover upon interest coupons; the lower federal courts followed what was deemed to be the rule thereunto adjudged by the state courts. Thereafter, the state courts announced a rule claimed to be inconsistent with the former one and this court followed the later announcement of the state court, and therein reversed the judgment of the Circuit Court of Appeals and of the Circuit Court.

Mr. Justice Brown:

> "But assuming that the latter case was intended to overrule the prior ones, and to lay down a different rule upon the subject, our conclusion would not be different. In determining what the laws of the several States are, which will be regarded as rules of decision, we are bound to look, not only at their constitutions and statutes, but at the decisions of their highest courts giving construction to them." (Citations omitted.)
>
> "If there be any inconsistency in the opinions of these courts, the general rule is that we follow the latest settled adjudications in preference to the earlier ones." (p. 508.)

Hartford Ins. Co. v. *Chicago, &c., Railway*, (175 U. S., 91), certiorari to the Circuit Court of Appeals, was instituted in the Iowa State Court and removed by the defendant to the United States Circuit Court.

Plaintiff, Insurance Company, sought to recover of defendant Railroad Company the sums which plaintiff had paid on policies issued by it for loss by fire of a storage warehouse and contents, owned by a partnership and situate upon defendant's railroad grounds at Monticello, Iowa, which fire, it was alleged, was caused by defendant's negligence. Defendant, by answer, pleaded a provision in the lease exempting it from liability for such loss caused by negligence of itself or servants.

Plaintiff demurred to the answer on the ground that such exemption from liability was void as against public policy.

At the argument of the demurrer it appeared that the same

question was then pending in the Supreme Court of the State of Iowa, and judgment upon the demurrer was suspended to await the decision of the state court. Upon the rendering of final decision in the state court sustaining the validity of the release of liability the demurrer was overruled, and plaintiff declining to plead further, final judgment was rendered in favor of defendant.

MR. JUSTICE GRAY:

"That judgment was unanimously affirmed by the Circuit Court of Appeals, upon the ground that the stipulation was valid, and was not against public policy; Judges Sanborn and Thayer, however, expressing the opinion (Judge Caldwell non-concurring in this respect) that the decision of the state court was not conclusive upon this question. (p. 95.) * * *

"Questions of public policy, as affecting the liability for acts done, or upon contracts made and to be performed, within one of the States of the Union—when not controlled by the Constitution, laws or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application—are governed by the law of the State, as expressed in its own constitution and statutes, or declared by its highest court. * * *

"The validity of the agreement now in controversy does not depend upon the Constitution, laws or treaties of the United States, or upon any principle of the commercial or mercantile law, or of general jurisprudence.

"Generally speaking, the right of a railroad corporation to build its road, and to run its locomotive engines and cars thereon, within any State, is derived from the legislature of the State; and it is within the undisputed powers of that legislature to prescribe the precautions that the corporation shall take to guard against injuries to the property of others by the running of its trains; as well as the measure of its liability in case such injuries happen." (pp. 100, 101.) * * *

POINT V.

The right and power to prescribe the rules of property law whereby recovery of consequential damage, occasioned by or under authority of a State, to real property in its domain, shall be accorded or refused, is matter of State prerogative not surrendered to federal governance, nor subject of its supervision.

Pennsylvania R.R. Co. v. *Miller*, 132 U. S. 75.
Marchant v. *Pennsylvania R.R. Co.*, 153 U. S. 380.

DOCTRINE OF *damnum absque injuria*, ADJUDGED TO GOVERN HEREIN, IS RECOGNIZED AS FUNDAMENTAL IN NEW YORK AND FEDERAL COURTS.

It is respectfully submitted that the decisions of the New York courts evince uniform and conclusive recognition of, as being a fundamental rule of property therein, that, in the absence of statutory provision to the contrary, the doctrine of *damnum absque injuria* governs all cases of consequential damage to real estate or to the use thereof, occasioned by the carrying into effect of measures commanded, directed, or specifically authorized by the state, primarily promotive of, or designed to promote the public safety, and convenience; or occasioned by subjection to the burden of public servitude of property or property right vested and held subject unto the right and power of such servitude.

The case of *Radcliff* v. *Brooklyn*, 4 N. Y. 195, though not the earliest, is regarded as a leading case in the application of this principle as a rule of property. Its principle is identical with that of *Callender* v. *Marsh*, 1 Pick. 417, which was cited and approved by this court in *Smith* v. *Corp. of Washington*, 20 How. 135, 149, which in turn, upon this point, was cited and approved in *Transportation Co.* v. *Chicago*, 99 U. S. 635; *Chicago* v. *Taylor*, 125 U. S. 161; *Wabash R. Co.* v. *Defiance*, 167 U. S. 88; *High Bridge Lumber Co.* v. *United States*, 69 Fed. 324; *Bauman* v. *Ross*, 167 U. S. 548, 587.

The principle of the *Radcliff* case has been recognized and approved by the New York Court of Appeals in many cases, among which are the following:

In *Bellinger* v. *N. Y. Central R.R Co.* (23 N. Y. 42, *48*, *52*) in respect of damages caused by so building a railroad as to obstruct a stream; *held* that the limitation upon the power to take property for public use without compensation,

"has no application to cases where property is not taken,

but only subjected to damages consequential upon some act done by the State or pursuant to its authority." (page 48.)

"Whether it was practically possible to have fixed the grade so that this '(damage by flooding)' would not have happened, can only be determined by the judgment of men skilled in such matters. The defendants, as the judge at the trial very properly said, were not insurers. But they were authorized to build the railroad at the place where they did build it; and if, necessarily and in spite of all reasonable safe guards and precautions in constructing the work, occasional disturbance to adjoining lands would arise from a winter freshet, it was the misfortune of the plaintiff that he had lands exposed to such occurrences." (page 52.)

In *Selden* v. *Del. & Hud. Canal Co.* (29 N. Y. 634, 642), plaintiff sought recovery of damage caused to his premises by raising of canal embankments and deepening of the canal by defendants whereby his premises were flooded.

"There is no allegation of bad faith on the part of the defendants, or their agents, or of any negligence or want of skill in the construction or management of the work whatever. The damages, as appears from the complaint, are mere consequential damages, naturally flowing from the construction and maintenance of the work, by reason of the nature and character of the structure, and not by reason of any negligence or unskillfulness in the carrying on or in the completion of the work of enlargement, and the evidence upon the trial, in this respect, seems to be all of the same character."

Held: no cause of action was alleged or proved.

In *Coster* v. *Mayor of Albany* (43 N. Y. 399, 415), *held:* that statutory provision of right of compensation for "all damages caused to property by the making of such improvement," did not apply to or embrace consequential damages.

Uline v. *N. Y. C. & H. R. R.R. Co.* (101 N. Y. 98, *101*), was for recovery of damages in respect of a railroad in a public street.

EARL, J.:

"But wherever a railroad is lawfully built with proper care and skill, there it is not a nuisance. What the law sanctions and authorizes is not a nuisance, although it may cause damages to individual rights and private property. If a railroad be built upon a highway, after acquiring the public right and the private property, if any, in the street or the soil thereof, then the owners thereof are

not responsible for any damages necessarily resulting from the construction or operation of the railroad to private property adjacent or near to the road, and so, too, the law has been settled in this State by many decisions" (page 107). * * *

"We have a case then where the defendant did acts in the street entirely lawful and where it was held liable for the consequential damages to the plaintiff's adjacent property, caused by the careful use of its lawful authority and the proper exercise of its legal rights. To uphold this recovery upon such a theory would subvert a very important rule of law about which there has been no substantial question in this State for at least thirty years." (page 108.)

In *Conklin* v. *Railroad Co.* (102 N. Y. 107, *111*), the defendant company having acquired the statutory right to cross a highway subject to the duty of so restoring the highway as not to impair its usefulness, crossed the highway below grade and bridged over its tracks and changed the grade of the highway approaches to the bridge and thereby inconvenienced the owner of the abutting land who owned the fee to the centre of the highway.

"The plaintiff's fee in it to its centre line was not subjected to a new or different use involving a new or added compensation, but it remained unchanged as the public highway originally laid out in everything but its grade. If it became such by dedication, compensation for the easement was expressly waived. If taken by right of eminent domain, the compensation paid covered all the damages sustained, among which were necessarily embraced such as might flow from a change of grade required for the public use and convenience. That might be altered by any lawful authority, and whatever of injury or inconvenience should result to the abutting owner was either waived by the dedication or paid for by the original compensation, so that a change of grade upon a highway invades no private right" (page 111).

Heiser v. *Mayor of New York* (104 N. Y. 68, *72*), was an action for damages alleged to have been occasioned by change of grade of a street.

"Before the act of 1872 no liability, either at common law or by statute, existed on the part of the defendant to owners of real estate, for injuries occasioned to them by changes of grade in the streets adjoining their premises." (Citations omitted.)

"Neither did the act of 1872 purport to create any such

liability except in the mode pointed out, and to the extent prescribed by such act.

"An appraisal by the board of assessors was by the statute made a condition precedent to the recovery of any compensation on the part of the injured party; the amount thereof was required to be assessed upon the premises thereby benefited; the right to enforce payment was predicated upon such appraisal and was limited to a claim for the delivery of assessment bonds by the comptroller, for the amount of the award made. No provision was made for the payment of such damages by the city at large, or in any other manner.

"The statute assumed to create a right where none existed before, and it defined not only the extent of the the right, but also the method of its enforcement.

It is well settled in the case of public improvements authorized by statute, wherein a mode of compensation is provided for persons injured thereby, that such mode is exclusive, and no right of action exists in their favor except that directed in the statute." (page 72.)

Atwater v. *Trustees*, etc. (124 N. Y. 602, *608*, *610*), was an action to recover damages occasioned by the flooding of plaintiff's pasture land whereby he lost the use thereof for one season. The flooding was caused by a dam built to prevent the flow of water causing interference with the building of a highway bridge.

The Court found there was no want of reasonable care in the execution of this public work; distinguished the case from the *St. Peter* v. *Denison* case (58 N. Y. 416), in that there was no trespass, the injury resulting consequential from the doing of the work; and, further distinguished it from *Pumpelly* v. *Green Bay Co.* (13 Wall. 166), in that the flooding was not permanent. The case was held governed by the doctrine of the *Radcliff* case, the matter of complaint *damnum absque injuria* and the direction of a verdict in favor of defendants affirmed.

In *Benner* v. *Atlantic Dredging Co.* (134 N. Y., 156, 161), plaintiff alleged damage in wrongfully and unlawfully so discharging blasts as to shake, jar, damage and injure his dwelling house. Defendant was engaged in work as a contractor under the United States Government, in the removal of obstructions in navigable waters.

LANDON, J.: "It being lawful for the sovereign to exercise its lawful power, it must follow that whatever results from its proper exercise is not unlawful, and if any injury, direct or consequential, results to the individual, he is remediless, except so far as the sovereign gives him a remedy."

In *Rauenstein* v. *N. Y., L. & W. R. Co.* (136 N. Y. 528, *536*, 537), plaintiff, the owner of premises abutting Commercial street, sought damages alleged to have been occasioned by raising the grade of that street to permit travel thereon over the grade of the railroad in Water street, the supposed ground of illegality thereof being that the railroad in Water street was illegal as to abutting owners there.

GRAY, J.: "The two guiding principles to be deduced from the authorities are, that the defendant, being lawfully in Water street, by authority of the public law and with the assent of the municipality, was not a nuisance, and, except as to abutters, invaded no legal rights; and that, in building the embankment in Commercial street, to permit of unimpeded travel upon that street over the railroad in Water street, the defendant was performing a duty imposed by the public law and prescribed by municipal ordinance, and, hence, could come under no responsibility to adjoining land owners. In this connection, I may say that for such consequential damages as are sought to be recovered here from a railroad company, which is lawfully in the occupation and use of a street, but which, incidentally, is the occasion of injury to property owners in an adjoining street, by reason of its performance of the statutory duty to conform its grade to the new use, the legislature might very properly, under limitations, grant a remedy. Without such remedial legislation, however, the case is one of *damnum absque injuria*. Nothing in the *Reining* case is in contradiction of the views expressed, and in support of them we have much authority, running back from the *Uline* case (*supra*) to that of *Radcliff's Executors* v. *Mayor, etc., of Brooklyn* (4 N. Y. 195).

"This construction in Commercial street was a change of grade, made by the defendant under legal compulsion, and individual interests are as much subordinate to the requirements of public interests in such a case, as, concededly, they would be if, as matter of fact, the city authorities had done the work themselves. As matter of law, its performance by the defendant was a performance by a constituted public authority." (pages 536, 537.)

In *Cogswell* v. *Railroad Co.* (103 N. Y., 10, *15*, *19*), an action for damages occasioned by alleged nuisance in the maintenance and use of a locomotive engine house adjacent to plaintiff's premises; as also in *Hill* v. *Mayor of N. Y.* (139 N. Y. 495, *501*), to enjoin the maintenance and use of the city's one-half of a pier for the purposes complained of as injurious to the use of plaintiff's one-half thereof; as also in *Folmsbee* v. *City of Amsterdam* (142 N. Y. 118, *122*), for

damages occasioned to plaintiff's premises by change of the established grade of a street, the defendant's reliance upon exercise of public authority as justification was held untenable in that the very thing complained of had not been authorized by the legislature.

In *Uppington* v. *City of New York* (165 N. Y. 222, *229*), plaintiff, an abutting owner, sought to recover damages alleged to have been occasioned to her house through the construction of a sewer by means of an open trench in the street.

> "VANN, *J.:* When a municipal corporation has general authority by statute to make a public improvement in a public street, which does not involve direct incroachment upon private property, it is not liable for consequential damages, unless they are caused by negligence, misconduct or want of skill on the part of its servants or agents" (citations omitted). "In such cases the corporation is the agent of the state, and acts done in the proper exercise of governmental powers do not make such agent liable at common law, even if they indirectly affect but do not directly invade private property. If the work is unlawful, the injury willful, or the damages are owing to the failure of the proper authorities to exercise due care or skill, there is no exemption from liability, even when the undertaking is wholly for the benefit of the public.
>
> "The relief sewer, which is the subject of this controversy, was lawful, because it was built wholly in a public street, without encroaching upon private property, and was duly authorized by statute. Such damages as were inflicted upon abutting property were an indirect result of the work and were not caused by willful misconduct." (pages 228, 229.) * * * * * * * *
>
> "As was said in *Atwater* v. *Trustees* (*supra*), which is an instructive case, 'serious injury to property may be occasioned by the lawful exercise of powers of public character pursuant to law, and if the work is carefully and skillfully performed the consequences may be *damnum absque injuria* when the legislature has provided for no compensation. In such case the protection of the owner of property not taken or appropriated, which may be subjected to hazard or injury, is in the care and skill to be observed by those engaged in the execution of the work. If they fail to do that they are liable for the consequences of such failure.'" (p. 232.)

The principle involved is altogether the same as that in the case of *Scranton* v. *Wheeler* (179 U. S. 141), error to the Supreme Court of Michigan, wherein the state court *held*, and this court affirmed the holding,

> "that the United States is not required to compensate an

owner of land fronting on a public navigable river when his right of access from the shore to the navigable part of such river is permanently obstructed by a pier erected in the river under the authority of Congress for the purpose only of improving navigation." (p. 141.)

Mr. Justice Harlan said:

"The vital question, therefore, is the one heretofore mentioned, namely, whether the prohibition in the Constitution of the United States of the taking of private property for public use without just compensation has any application to the case of an owner of land bordering on a public navigable river whose access from his land to navigability is permanently lost by reason of the construction of a pier resting on submerged lands away from but in front of his upland, and which pier was erected by the United States not with any intent to impair the rights of riparian owners but for the purpose only of improving the navigation of such river.

Undoubtedly compensation must be made or secured to the owner when that which is done is to be regarded as a taking of private property for public use within the meaning of the Fifth Amendment of the Constitution; and of course in its exercise of the power to regulate commerce, Congress may not override the provision that just compensation must be made when private property is taken for public use. What is private property within the meaning of that Amendment, or what is a taking of private property for public use, is not always easy to determine. No decision of this court has announced a rule that will embrace every case. But what has been said in some cases involving the general question will assist us in determining whether the present plaintiff has been denied the protection secured by the constitutional provision in question." (pp. 153,154.)

The opinion refers to and quotes from the case of *Pumpelly* v. *Green Bay Co.* (13 Wall. 166), a case of permanent overflow of land, and proceeds as follows:

"That case was relied upon in *Transportation Co.* vs. *Chicago*, 99 U. S., 635, 642, as establishing the invalidity of certain municipal acts looking to the improvement of a public highway. But this court said that 'acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property

to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority.' * * *

"When erecting the pier in question, the Government had no object in view except, in the interest of the public, to improve navigation. It was not designed arbitrarily or capriciously to destroy rights belonging to any riparian owner. What was done was manifestly necessary to meet the demands of international and interstate commerce. In our opinion, it was not intended that the paramount authority of Congress to improve the navigation of the public navigable waters of the United States should be crippled by compelling the Government to make compensation for the injury to a riparian owner's right of access to navigability that might incidentally result from an improvement ordered by Congress." (pp. 154, 165.)

So here the purport of the enactment was the improvement of the street for public travel therein. The method of such improvement was of necessity chosen with reference to the railroad right subject to which the street existed. The title of plaintiff to easements of light, air and access was not a full, complete and absolute title, but a qualified title, held subject to such regulation of the public street as should be found suited to its character as a railroad street.

It is undisputed that the regulation prescribed and carried into effect by the State was one suited to the purpose of improving the street for its primary purpose and use, of public travel therein. There is no reasonable ground upon which to impute to the acts, grants and proceedings culminating in the production of this street as it existed at the date of the 1892 enactment the intent or contemplation that the paramount authority of the State to regulate the street promotive of public convenience should be crippled by compelling the State to make compensation for loss or damage thereby occasioned to abutters' easements.

As in *Gibson* vs. *United States* (166 U. S., 269), appeal from the Court of Claims, involving claim of damage in respect of an improvement of navigation, whereby free ingress and egress to and from plaintiff's premises was prevented, this Court by Mr. Chief Justice Fuller, said:

"The Fifth Amendment to the Constitution of the United States provides that private property shall not 'be taken for public use without just compensation.' Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the

lawful and proper exercise of a governmental power" (p. 275).

"Moreover, riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard. The legislative authority for these works consisted simply in an appropriation for their construction, but this was an assertion of a right belonging to the Government, to which riparian property was subject, and not of a right to appropriate private property, not burdened with such servitude, to public purposes.

"In short, the damage resulting from the prosecution of this improvement of a navigable highway, for the public good, was not the result of a taking of appellant's property, and was merely incidental to the exercise of a servitude to which her property had always been subject" (p. 276).

So here the damage complained of is not the result of the taking of plaintiff's property, but the incidental consequences of the lawful and proper exercise of a governmental power.

Moreover, public highway abutters' ownership of easements is subject to the obligation to suffer the consequences of improvement of the public street in the exercise of the dominant right of the State in that regard. The legislative direction of and for such improvement consisted of assertion of a right belonging to the State, to which abutters' easement property was subject, and not of a right to appropriate private property, not burdened with such servitude, to public purposes.

In short, the damage resulting from the prosecution of this improvement of a public street, for the public good, was not the result of the taking of plaintiff's property, and was merely incidental to the exercise of a servitude to which his easements have always been subject.

Within the principle as above recognized and vindicated, is the body of State law contained in the State Constitution, statutes and common law rules of the State of New York, which distinguish between the case of property taken for, or trespassed upon by a public use, and that of, thus occasioned, consequential damage to property; and which recognize invasion of property right, and afford remedy in respect of the former, and refuse recognition of invasion of property right, and deny remedy in respect of the latter.

The 1892 enactment constituted assertion by the State of the right and power to enlarge the area and usefulness of the avenue for public travel therein, by the improvement prescribed

by, and carried into effect under that act. It left intact and unaffected by its provisions the body of rules of State Constitution, statute and common law whereby plain and adequate right and remedy are prescribed and afforded in respect of private property taken for or trespassed upon by any public use. It also left intact, the authority and power of the defendant Harlem Company, to acquire by condemnation whatsoever property might be requisite for the building, maintenance and operation of its railroad in conformity to law, which was conferred upon and vested in it by Section Eight of its Charter (Supp. hereto, p. 4), and by Sections Four and Seven of the Railroad Law (Chap. 565, Laws of 1890), as amended (Chap. 676, Laws of 1892).

The sufficiency of these for and their adaptability to the exigencies presented by plaintiff's case is not challenged by either party to this record, and is conclusively exhibited in the *Reining*, *Egerer*, *Am. Bank Note Company*, *Bohm* and *Sperb* cases, *supra*.

Thus it is not herein, and cannot in any case be disputed, that the right of action and remedy for such taking of or trespass upon private property, if any, as may be committed in and by compliance with or carrying into effect of the 1892 enactment, is as plain and adequate as if that enactment had embraced express provision of and for such right and remedy.

And upon this principle is based the judgment of the Court of Appeals in the *Dolan*, *Ehret*, *Ketcham*, *Mt. Morris Bank*, *Pape* and *Welde* cases, *supra*, in respect of this 1892 enactment.

If the 1892 enactment had contained express provision for compensation for property taken or trespassed upon by such elevation of the railroad and enlargement of the street as was therein provided for, complaint and proof as plaintiff presents herein would nevertheless have involved the question whether therein and thereby his property was indeed taken or trespassed upon, and the basis and theory for determination of these questions would have been exactly the same as that of the *Radcliff* and other like cases, and that upon which the case at bar was determined. And if that enactment had contained express provisions of right of compensation for "all damages caused to property by the making of the improvement" or other words of like import, such complaint and proof as is herein presented would nevertheless have involved the question as in *Coster* v. *Mayor*, *supra*, and *Marchant* v. *Pennsylvania R.R. Co.*, *supra*, whether such provision did or did not apply to and embrace mere consequential damages.

Either such question is none the less a non-federal one because involving application and interpretation of rules of state law as adjudged and determined by the state courts, rather

than application and interpretation of specific legislative enactment.

Detroit v. *Osborne*, 135 U. S. 492.

The trial court found and adjudged that the improvement, executed in pursuance of the enactment, trespassed upon plaintiff's easements, and further adjudged existing laws applicable to and adequate for ascertainment of, and award of compensation for the property the subject of that trespass.

The Court of Appeals did not reverse the judgment upon the ground or theory that the lower court had erred in adjudging existing laws applicable to and adequate authority for ascertainment and award of compensation for property taken or trespassed upon, but did reverse the judgment upon the ground and theory that the damage occasioned was consequential merely, and hence not actionable.

This is purely a local question, and as decided shows plaintiff not in position to contend that the enactment is invalid, in that it fails to provide compensation in favor of any who may suffer actionable damage resultant from the carrying into effect of its provisions.

Castillo v. *McConnico*, 168 U. S. 674.
Tyler v. *Registration Court Judges*, 179 U. S. 405.
Hooker v. *Burr*, 194 U. S. 415.

Summary.

The plaintiff invoked and had herein the usual and ordinary process, the orderly and full hearing, and thereupon determination and adjudication in respect of the alleged taking of and trespass upon his easements in Park avenue in and by the maintenance and use of the elevated railroad structure described in his complaint.

The said structure was directed and built by the State, and used in obedience to the command of the State, extending above and over, and supported by columns standing in and upon, land which was theretofore and thereunto, rightfully, as against plaintiff, occupied and used exclusively by and for the railroad. The State directed and carried into effect this elevation of railroad structure and operations for the purpose of and thereby effected the enlargement of the street surface by embracing therein and extending the same over the ground theretofore as aforesaid occupied and used exclusively by and for the railroad and its operations.

In and by the proceedings taken and had in the said action only long-time-established process and procedure were availed of and followed, and only long time-established and vindicated rule of property laws were administered.

The 1892 enactment, which plaintiff alleges to be violative of the federal constitution, as and by way of (1) taking his property without due process of law, and, (2), impairing the obligations of contracts, contained no provision the purport whereof would or might in any wise deprive complainants of, or restrain them in or about availing themselves of the plain and adequate process and remedy provided by existing laws in respect of property taken for, or trespassed upon in and about the carrying into effect of, a lawfully authorized public use. That enactment was not in any wise asserted or relied upon by the defendants as or by way of a defense or shield to protect them from liability in respect of any property appropriated or contract obligation violated, nor was it in any wise adjudged to constitute such shield in respect of either property taken or contract broken.

The power of the State to prescribe and carry into effect this regulation as and for and by way of enlargement of the street surface for public travel therein was taken for granted by both parties, and all questions in respect of the possession of such power or of the proper exercise thereof, excluded from dispute by the nature and form of the action and issue. The questions litigated had relation solely to the fact and measure of taking of or trespass upon private property, which had resulted from the carrying into effect of the provisions of the enactment.

The ground upon which plaintiff was adjudged disentitled to recover was, that in so far as it appeared that plaintiff had any right or title in or to the easements, the subject of the alleged taking and trespass, his right and title thereto were in such wise subordinate and subject unto respective and joint public street and railroad servitude that the acts and conduct of which he complained did not constitute any taking of or trespass upon the said easements, invaded no legal right and violated no legal duty, and hence that the loss and damage alleged were within and governed by the rule of *damnum absque injuria*.

The judgment is founded upon interpretation and application of local rules of law, following and consequent upon the exercise and administration of ordinary and usual process, and in no wise involving any question to which federal constitution inhibitions have relation.

The petition in error should be dismissed for want of jurisdiction, or, the judgment should be affirmed.

IRA A. PLACE,
Attorney for Defendants in Error.

THOMAS EMERY,
Of Counsel.

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CHAP. 263.

AN ACT to incorporate the New-York and Harlaem Rail-Road Company.

Passed April 25, 1831.

The People of the State of New-York, represented in Senate and Assembly, do enact as follows:

SEC. 1. Benjamin Bailey, Mordecai M. Noah, Benson McGown, James B. Murray, Charles Henry Hall, Moses Henriques, Isaac Adriance, Thomas Addis Emmet, Gideon Lee, Silas E. Burrows, Samuel F. Halsey, Cornelius Harsen and Robert Stewart, with such other persons as shall associate with them for that purpose, are constituted a body politic and corporate, by the name of the New-York and Harlaem Rail-Road Company, with power to construct a single or double rail-road or way, from any point on the north bounds of Twenty-third street, to any point on the Harlaem river, between the east bounds of the Third avenue and the west bounds of the Eighth avenue, with a branch to the Hudson river, between One hundred and twenty-fourth street and the north bounds of One hundred and twenty-ninth street, to transport, take and carry property and persons upon the same, by the power and force of steam, of animals, or of any mechanical or other power, or of any combination of them which the said company may choose to employ; and by that name, they and their successors shall be and they are hereby vested with the right and privilege of constructing, erecting, building, making and using a single or double rail-road or way for the purpose aforesaid, and for the term of thirty years from the passage of this act.

SEC. 2. If the corporation hereby created shall not within six months from the passage of this act, locate the route of said rail-road or way and the branch to the same, and make a survey of such location, and file a map thereof in the register's office of the city and county of New York, and within two years from the passage of this act commence, and within four years from the passage of this act construct, finish, and put in operation the said single or double rail-road or ways, then the said corporation shall thenceforth forever cease, and this act shall be null and void; but no such map shall be filed until the same shall have been submitted to and approved by the common council of the city of New-York; such approbation shall be expressed by a joint resolution of the said common council, declaring their approbation of the map, and of the route of the said rail-road indicated therein.

SEC. 3. The capital stock of the said company shall be three hundred and fifty thousand dollars, and the stock shall

be divided into shares of fifty dollars each, and shall be deemed personal property, transferrable in such manner as the by-laws of said corporation shall direct.

SEC. 4. Isaac Adriance, Mordecai M. Noah, Benjamin Bailey, Moses Henriques, Thomas Addis Emmet, Benson McGown, Silas E. Burrows, Samuel F. Halsey, Cornelius Harsen, and Robert Stuart shall be commissioners, the duty of whom it shall be, on or before the first Monday of June next after the passing of this act, at some suitable place in the city of New-York, to open books to receive subscriptions to the capital stock of the said corporation, and twenty days' public notice shall be given by the said commissioners of the time and place of opening such books, in one of the public newspapers of the said city; and said books shall be kept open for three days from ten to two o'clock of each day, and within ten days after the said stock shall be subscribed, to give a like notice for a meeting of the stockholders, at such time and place as the said commissioners shall appoint, to choose thirteen directors, and such election shall be then and there made by such of the stockholders as shall attend for that purpose, either in person or by proxy, each share of the capital stock entitling the stockholder to one vote; and the said commissioners shall be inspectors of the first election of directors of the said corporation, and shall certify, under their hands, the names of those duly elected, and deliver over the subscription books to the said board of directors; and the time and place of holding the first meeting of the first directors shall be fixed by the said commissioners, and the said board of directors shall have power to appoint an engineer, and cause such examinations and surveys for the said rail-road to be made as may be necessary to the selection by them of the most advantageous line, course or way for the said way; and the said board of directors shall, after such examinations and surveys shall be made, select and under their hands and seals, designate the line, course or way, which they may deem most advantageous for the said rail-road, one of which certificates shall be filed in the office of the register of the city and county of New-York; which line, course or way, so selected and certified, shall be deemed the line, course or way on which the said corporation shall construct, erect, build or make their single or double rail-road or ways as hereinafter mentioned; the expenses of all which surveys and examinations, and all manner of incidental expenses relating thereto, shall be paid for by the said corporation.

SEC. 5. The commissioners shall proceed to distribute the capital stock of the said corporation among the subscribers thereto; and in case there should be subscriptions to more than the amount of such stock, within the time above pre-

scribed, it shall be the duty of the said commissioners to apportion the same among the subscribers thereto, in such manner as they shall deem most advantageous to the interest of the institution; but no person who shall have subscribed for twenty shares or upwards, shall, upon such distribution, receive less than twenty shares, unless the subscriptions for the said last mentioned or a less number of shares, shall exceed the whole amount of the capital stock; nor shall there be allowed to any one of the commissioners or subscribers, directly or indirectly, or to any one in trust, for him, more than two hundred shares of said stock, if, without such allowance, the whole of the stock be taken up; and if, at the expiration of the third day on which the subscription books shall have been kept open, the whole amount of the capital stock shall not have been subscribed, then the commissioners may subscribe for the remaining shares.

SEC. 6. The said board of directors to be chosen at such meeting, or at such annual election, shall, as soon as may be after every election, choose out of their own number one president, and one other person to be vice-president; and in case of the death, resignation or absence of the president, the vice-president shall preside until the annual election thereafter, or until he shall return, or another president shall be chosen; and in case of the death or resignation of the president or vice-president, or of any director, such vacancy or vacancies may be filled for the remainder of the year, wherein they may happen, by the board of directors; and in case of the absence of the president and vice president, the board of directors shall have power to appoint a president *pro tempore*, who shall have and exercise such powers and functions as the by-laws of the said corporation may provide.

SEC. 7. In case it should at any time happen that an election of directors shall not be made on any day when pursuant to this act it ought to have been made, the said corporation shall not for that cause be deemed to be dissolved, but such election may be held at any other time directed by the by-laws of the said corporation, within sixty days after the day on which it should have been held.

SEC. 8. The said corporation are hereby authorized, by their agents, surveyor, and engineers, to enter upon such route, place or places, to be designated as aforesaid by the said directors, as the line, course, road and way whereon to construct their single or double rail-road or ways; and it shall be lawful for the said corporation to enter upon and take possession of and use all such lands and real estate as may be indispensable for the construction and maintenance of their single or double rail-road or ways, and may also receive, hold and take all such voluntary grants and donations of land and real estate as shall

be made to the said corporation, to aid in the construction, maintenance and accommodation of the said single or double rail-road, or ways, provided that all lands or real estate thus entered and taken possession of and used by the said corporation, and which are not donations, shall be purchased by the said corporation, of the owner or owners of the same, at a price to be mutually agreed upon between them; and in case of a disagreement of price, and before the making of any portion of the road upon said land, the said corporation or the owner of such land may apply by petition to the vice-chancellor of the first circuit, who upon such application shall cause such notice to be given to the other party as he shall deem proper and sufficient, appointing therein the time and place of hearing the parties, at which time and place, upon proof that the notice directed has been given, the said vice-chancellor shall direct the manner of ascertaining the damages which the owner of such land or real estate will sustain by the occupation thereof by the said corporation; and the said vice-chancellor shall appoint three competent and disinterested commissioners, who shall be freeholders and residents of the city of New-York, and who shall, under the direction of the said vice-chancellor, make appraisements and determine said damages and report in writing under their hands to the said vice chancellor, who shall examine the same and hear the parties in relation thereto if he shall deem it expedient, and increase or diminish the damages if he shall be satisfied injustice has been done. The report shall contain a minute and accurate description of the land appraised. The commissioners shall be allowed three dollars each a day for their services. Upon proof to the said vice-chancellor, to be made within thirty days after his determination of payment to the owner or of the depositing to the credit of the owner in such incorporated moneyed institution, as the said vice chancellor shall direct, of the amount of said damages and the payment of all expenses, the said vice-chancellor shall make an order or decree, particularly describing the land and reciting the appraisement of damages and the mode of making it, and all other facts necessary to a compliance with this section of this act; and when the said order or decree shall be recorded in the office of the register of the city and county of New-York, the said corporation shall be seized and possessed of the fee simple of all such lands or real estate, and may enter upon, take and use the same for the purposes of the said road.

SEC. 9. In case any married woman, infant, idiot or insane person or non-resident of the state, who shall not appear after such notice, shall be interested in any such land or real estate, the said vice-chancellor shall appoint some competent disinterested person to appear before the said commissioners and act

for and in behalf of such married woman, infant, idiot, insane person or non-resident.

SEC. 10. The said corporation is hereby authorized to construct, erect, build, make and use a single or double rail-road or ways, of suitable width and dimensions, to be determined by the said corporation, on the line, course and way, selected or designated by them in manner aforesaid, and shall have power to regulate the time and manner in which goods and passengers shall be transported, taken and carried on the same, and shall have power to erect and maintain toll-houses and such other buildings for the accommodation of their concerns, as they may deem suitable to their interests: The said corporation shall not take any lands without the consent of the owner or owners thereof, exceeding forty feet in width from east to west, and shall in case of their locating the route of the said rail-road in or along any public street or avenue now laid out on the map or plan of the city of New-York, leave sufficient space in the said street or avenue on each side of the said railroad for a public highway for carriages, and for a side walk for foot passengers.

SEC. 11. Whenever it shall be necessary for the construction of their single or double rail-road or way, to intersect or cross any stream of water or water courses, or any road, street or highway, it shall be lawful for the said corporation, with the consent and approbation of the mayor, aldermen and commonalty of the city of New-York, to construct their single or double rail-road or ways across or upon the same; provided that the corporation shall restore the stream or water course or road, street or highway thus intersected, to its former state, or in a sufficient manner not to have impaired its usefulness, and shall moreover erect and maintain sufficient fences upon the line of the route of their single or double rail-road or ways.

SEC. 12. It shall be lawful for the company hereby incorporated, from time to time to fix, regulate and receive the tolls and charges by them to be received for transportation of property or persons on the single or double rail-road or ways aforesaid, hereby authorized to be constructed, erected, built, made and used.

SEC. 13. If any person or persons shall wilfully do or cause to be done any act or acts whatever, whereby any building, construction or work of the said corporation, or any engine, machine or structure, or any matter or thing appertaining to the same shall be stopped, obstructed, impaired, weakened, injured or destroyed, the person or persons so offending shall forfeit and pay to the said corporation double the amount of damages sustained by means of such offence or injury, to be recovered in the name of the said corporation, with costs of suit, by action of debt.

SEC. 14. Each subscriber shall pay twenty per cent on the amount subscribed by him, at the time of making such subscription; and it shall be lawful for the directors or a majority of them, to require payment of such other sums of the capital stock at such times and in such proportions and on such conditions as they shall deem fit, under the penalty of the forfeitures of all previous payments thereon, and shall give notice of the payments thus required, and of the place and time when the same are to be paid, at least thirty days previous to the payment of the same, in a public newspaper published in the city of New-York.

SEC. 15. The said corporation shall possess the general powers, and be subject to the general restrictions and liabilities prescribed by such parts of the eighteenth chapter of the first part of the Revised Statutes as are not repealed.

SEC. 16. Nothing in this act shall be deemed to authorize the said corporation to construct or use their single or double rail-road or way across or along any of the streets or avenues as designated on the map of the city of New-York, whether such streets or avenues shall have been opened or not, without the consent of the mayor, aldermen and commonalty of said city, who are hereby authorized to grant permission to the said corporation to construct their said rail-road or way across or along said streets or avenues, or prohibit them from constructing the same, and after the same shall be constructed, to regulate the time and manner of using the same, and the speed with which carriages shall be permitted to move on the same or any part thereof; and nothing in this act contained shall prevent the legislature from granting to any other corporation or persons, the right of constructing a rail-road or roads parallel with the one herein mentioned, or any part of it, on any lands, street, road or avenue not occupied by the rail-road or way hereby authorized, or the right of crossing or intersecting the same at any point or points, without making compensation for injuries sustained thereby.

SEC. 17. No person who shall at the time be a member of either branch of the common council of the city of New-York, shall act as commissioner or director of said corporation under this act.

SEC. 18. The legislature may at any time alter, amend, modify or repeal this act.

CHAP. 274.

AN ACT to alter the map or plan of the city of New-York.

Passed April 27, 1837.

The People of the State of New-York, represented in Senate and Assembly, do enact as follows:

SEC. 1. All that part of Forty-First-street lying between the Fifth and Sixth avenues; also all that part of Sixty-Eighth-street lying between the Third and Fourth avenues; also all those parts of Eightieth, Eighty-First, Eighty-Second, Eighty-Third, Eighty-Fourth and Eighty-Fifth-streets lying between the Sixth and Seventh avenues, as the same are laid out and designated on the map or plan of the city of New-York, are hereby discontinued on the said map or plan.

SEC. 2. The Fourth avenue shall be continued and extended on the said map or plan from Sixty-Sixth-street to Sixty-Eighth-street. Also Avenue A and the First, Second, Third and Fourth avenues shall be respectively continued and extended on the said map or plan from One Hundred and Sixth-street to One Hundred and Ninth-street. Also One Hundred and Seventh and One Hundred and Eighth-streets shall be respectively continued and extended on the said map or plan from the Fifth avenue to the Harlaem river. And the owner or owners of the lands and tenements which shall be included in any blocks or plots of ground to be formed by such extension and continuation of the said avenues and streets, respectively, shall have, hold, occupy, possess and enjoy the same, in like manner as he, she or they would have been entitled to do if the said avenues and streets had been originally so extended and continued on the said map or plan; and whenever the said avenues or streets, or any or either of them, shall be opened, the damage and benefit shall be estimated, assessed and paid, in like manner as the same would have been done if the said avenues and streets had been originally so extended and continued.

SEC. 3. All that part of the Fourth avenue in the city of New-York, lying between Thirty-Fourth-street, and the Harlaem river, shall be widened on the map or plan of the said city, by adding thereto, on each side thereof, twenty feet of land, so as to make the whole width of that part of the said avenue one hundred and forty feet.

SEC. 4. The said part of the Fourth avenue so to be widened is hereby declared to be one of the avenues of the city of New-York in like manner and with the like effect as if the same had been so laid out by the commissioners appointed in and by the act, entitled "An act relative to improvements touching the laying out of streets and roads in the city of New-York, and for other purposes," passed April 3d, 1807.

CHAP. 143.

AN ACT to amend an act entitled "An act relating to the New-York and Harlem Railroad Company," passed May 7, 1840, and the acts amending the same.

Passed March 29, 1848.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

* * * * *

Sec. 6. The New-York and New-Haven Railroad Company is hereby authorized to enter upon and run their cars and engines for passengers, freights, mails, expresses and other business, over the road of the New York and Harlem Railroad Company, from the point of junction of the roads of said companies at or near William's bridge, in the county of Westchester, to the city of New-York, and as far into said city as the said Harlem railroad may extend, upon such terms and to such point as has been or may hereafter be agreed upon by and between said companies; a copy of such agreement or agreements to be duly authenticated and filed in the office of the secretary of state of this state; and to take, transport and convey persons and property upon the said Harlem railroad, by the power and force of steam or animals or any mechanical power or combination of the same.

CHAP. 387.

AN ACT to extend the charter of the New York and Harlem Railroad Company, and to determine the mode of using the same in the streets of New York.

Passed April 16, 1859.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The New York and Harlem Railroad Company are hereby authorized, pursuant to the ordinance of the mayor, aldermen and commonalty of the city of New York, passed December twenty-seventh, eighteen hundred and fifty-eight, and approved December thirty-first, eighteen hundred and fifty-eight, to lay down a double track or railway from their track in the Fourth avenue, at Forty-second street, up said street to Madison avenue, and up Madison avenue to Seventy-ninth street, for the use of their small cars only.

SEC. 2. The New York and Harlem Railroad Company is hereby authorized, empowered and permitted to use steam in the drawing of their passenger and freight cars, upon their railroad on the Fourth avenue, to and from the northern extremity of Manhattan or New York island, to the south side of Forty-second street, in said city, with turnouts to their en-

gine-houses, respectively, for a period of thirty years from the thirty-first day of December, eighteen hundred and fifty-eight.

SEC. 3. All the rights, privileges and franchises given and granted to the New York and Harlem Railroad Company, in and by their act of incorporation, passed April twenty-fifth, eighteen hundred and thirty-one, and the several acts amending the same, subject to all the restrictions imposed by said several acts, except as herein modified, are hereby extended for the term of thirty years from the passage of this act. Nothing in this act shall be construed to prevent the legislature at any future time from rescinding, altering or amending this act, or the privileges hereby granted.

SEC. 4. This act shall take effect immediately.

CHAP. 880.

AN ACT for the protection of persons traveling upon Fourth avenue, in the city of New York.

Passed May 10, 1867; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The New York and Harlem railroad company shall within two years from the passage of this act, construct up to the grade of Fourth avenue, in the city of New York, a substantial stone or brick wall, with suitable coping upon each side of their road, upon a line not exceeding twenty-six feet in the clear at any point of measurement below the tunnel at Ninety-second street in said city, and from the north side of Seventy-ninth street to the south side of Eighty-eighth street, where the road bed or track is below the grade of the avenue, and where the same is not arched or covered, and shall also, within said period, erect upon said wall (except at street crossings, where bridges are, or shall be constructed) a substantial iron fence for the protection of persons using said avenue, said wall and fence to be so finished and constructed, as shall be approved by the engineer of the Croton aqueduct board. Said wall shall extend as high above the grade of the avenue as the said engineer shall direct, and the railing thereon shall be not less than three feet in height; and one-half of said wall in lineal feet shall be constructed within one year from the date of the passage of this act, and the balance in two years.

SEC. 2. Within two years after the passage of this act, The New York and Harlem Railroad Company shall construct and complete an arch of masonry work over the track of the road of said company, in the Fourth avenue of the city of New York, from the south line of Eighty-eighth street to and connecting with the rock cut so called on Ninety-second street, in the said city. The said arch shall be constructed of such ma-

terial, and of such thickness, and of such strength and in such manner in all respects as the engineer of the Croton aqueduct board shall prescribe. Whenever the said company shall have expended the sum of twenty-five thousand dollars in the prosecution of the said work, and shall produce to the comptroller of the city of New York the certificate of the said engineer to that effect, the said comptroller shall draw his warrant in favor of the said company upon the treasury of the said city, and deliver the said warrant to the said company for the sum of twelve thousand five hundred dollars, and so on from time to time as often as the said company shall have expended a like sum of twenty-five thousand dollars, and shall produce the like certificate of the said engineer, the said comptroller shall draw his warrant in favor of the said company and deliver it to the said company, upon the treasury of the said city for the like sum of twelve thousand five hundred dollars. And when the said company shall have fully completed the said arch to the full satisfaction and approval of the said engineer, and shall produce his certificate to that effect and of the last installment expended by the said company in the construction thereof to the said comptroller, the said comptroller shall draw his warrant in favor of the said company and deliver the same to the said company for one-half of the amount of such last installment. The said several warrants shall be paid out of any moneys in the treasury of the said city raised and appropriated for roads and avenues. The construction of the said arch shall be commenced on or before the first day of July next, and one-half thereof shall be completed in one year from the said first day of July next, and the balance in two years from the passage of this act. Nothing in this act contained shall be held or construed to oblige the said company to fill in and grade and level over and about the said arch, but filling in and grading and levelling over and about the same shall be done by the mayor, aldermen and commonalty of the said city.

SEC. 3. It shall be the duty of the city authorities of the city of New York, now vested with the power of regulating and grading the streets and avenues of said city, to regulate and put in good condition said avenue, and fill in the spaces behind said walls as rapidly as they shall be constructed by said railroad company.

SEC. 4. If the said railroad company shall fail to comply with any of the provisions of this act, they shall be liable to a penalty of two hundred and fifty dollars for each and every day said failure to comply shall continue, unless said engineer shall certify that said railroad company have used due diligence in prosecuting said work, which penalty, with costs, shall be sued for by the district attorney of the county of New York, in the name of the people of the State, in any court of

record in said county, and which penalty, when recovered, shall be paid by said district attorney, as follows: one-half of said penalty to the informer, and the other half to the commissioners of charities and corrections, to be used by them in such manner, for the benefit of the persons under their charge, as they shall deem best.

SEC. 5. Nothing in this act contained shall be construed as in any manner extending or increasing the rights of said railroad company, or as depriving the common council of the city of New York of any powers now possessed by it, except as specially herein provided.

SEC. 6. The legislature may at any time amend or repeal this act.

SEC. 7. This act shall take effect immediately.

CHAP. 702.

AN ACT to improve and regulate the use of the Fourth avenue in the city of New York.

Passed May 14, 1872; three-fifths being present.

The people of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The New York and Harlem Railroad Company is hereby authorized and required to regulate the grade of their railroad in the Fourth avenue of the city of New York, and to construct such viaducts, foot and road bridges over the same, and such excavations and tunnels under the same, with openings for proper ventilation, for the purpose of rendering the same safe and convenient to any persons crossing the same, and the railroad trains and passengers traveling thereon, in the following manner, namely: At Forty-fifth and Forty-eighth streets, to construct tunnels under the said streets and the Fourth avenue for sidewalks and carriage ways underneath the railroad at least thirty-four feet wide, or bridges over the railroad of at least that width, for the same purpose, and at Forty-sixth, Forty-seventh and Forty-ninth streets tunnels under the said streets and the Fourth avenue, or bridges over the same, at least twelve feet in width, for foot passengers. Said tunnels or bridges shall have easy approaches, and the tunnels shall be dry and thoroughly ventilated and lighted. Between Forty-eighth and Forty-ninth streets the grade of the railroad shall commence to descend, and shall descend as rapidly as the operation of the road will permit, so that at Fifty-sixth street the grade of the railroad shall be thirteen feet six inches below the grade of the avenue; and from thence to Ninety-sixth street the road shall run through a covered way, with openings in the coverings not to exceed one hundred and fifty feet in length, and twenty feet in width in each block;

and thence continuing upon the present grade to the center of One Hundred and Fifth street, and thence descending at the rate of about forty feet to the mile to the center of One Hundred and Twentieth street, where the said grade shall be fourteen feet one inch below the grade of the avenue; thence descending at the rate of about twelve feet and four-tenth of a foot to the mile to the center of One Hundred and Twenty-ninth street, where said railroad grade shall be eleven feet below the grade of the avenue; thence ascending at the rate of twenty-six feet and four-tenths of a foot to the mile to the center of One Hundred and Thirty-third street to and upon the present grade of the railroad; the grade of said road at Fifty-ninth street shall not exceed fifteen feet six inches below the grade of the said avenue as established by law. At Seventy-fourth street it shall not exceed thirteen feet six inches, and at Seventy-ninth street shall not exceed twelve feet. At Fiftieth and Fifty-first streets, elevated bridges of iron for foot passengers shall be constructed over the railroad. Between Fifty-second and Fifty-third streets a bridge shall be constructed for foot passengers and carriages over the railroad, with approaches parallel with the railroad, and at Fifty-fourth and Fifty-fifth streets bridges of iron shall be constructed for foot passengers over the railroad; and from Ninety-eighth street to One Hundred and Fifteenth street, the railroad shall be carried upon a viaduct, with stone arches or iron bridges in said viaduct over the cross or intersecting streets above One Hundred and First street, to and include One Hundred and Thirteenth street. Between One Hundred and Seventeenth and One Hundred and Eighteenth streets, a bridge shall be constructed over the railroad with parallel approaches, the same as before provided between Fifty-second and Fifty-third streets; from One Hundred and Nineteenth street to One Hundred and Twenty-ninth street inclusive, iron bridges over the railroad shall be constructed upon the line of each street the full width of the street. At One Hundred and Thirtieth and One Hundred and Thirty-first streets, iron bridges for foot passengers shall be constructed over said railroad; between Forty-fifth and Forty-ninth streets, including said streets, iron railings or brick walls shall be erected in said streets, outside the railroad tracks, so as to prevent crossing at a level with said railroad tracks. A coping and iron railing shall be constructed upon the parapet and retaining walls along the said improvement, wherever the said roadway runs through an open cut, and also around the openings between Fifty-sixth and Ninety-six streets.

SEC. 2. During the progress of the work, the New York and Harlem Railroad Company is hereby authorized to lay down such additional temporary tracks on the Fourth avenue, above

Forty-second street, as may be necessary for the railroad business during the progress of the work, and such tracks shall be removed when the work shall be completed, and said company is hereby authorized, for the purpose of facilitating rapid transit and accommodating local traffic, to lay down permanently two additional tracks on said avenue, and to make such landings and excavations in said avenue as may be required for such additional tracks, with landings for the entrance and delivery of passengers outside of the said excavations and viaduct.

SEC. 3. Whenever it shall be found advisable or necessary to alter the grade of the streets crossing the said avenue or of the said avenue, where the said road shall pass through a covered way, the same may be done by said company, but so as not to interfere with the free use of the streets by the public.

SEC. 4. The sidewalks on Fourth avenue between Forty-ninth and Fifty-sixth streets, and between Ninety-sixth street and the Harlem river, shall not exceed fifteen feet in width.

SEC. 5. Whenever it shall be necessary in the progress of said work to remove or alter the Croton water pipes, sewers or gas pipes upon said avenue, the same shall be done by the department or corporation having charge thereof, so as not to interfere with said work.

SEC. 6. There shall be a board of engineers, whose duty it shall be to execute, direct and superintend the construction of the said improvement, to be called the board of engineers of the Fourth avenue improvement. It shall be the duty of the said board to file a monthly statement, under oath, of the items of their expenditure with the comptroller of the city of New York. Regular accounts of all their transactions shall be kept by the board, which shall be open to the inspection of the officers of the said railroad company, and to the comptroller of the city of New York. The said board are authorized to pass suitable by-laws for their own regulation and government, and to select a presiding officer and secretary from their own number. They shall keep a record of all their proceedings. The said board shall consist of four members, as follows, namely: Allan Campbell and Alfred W. Craven, or their successors, and the chief engineer of the board of public works of the city of New York for the time being, and the engineer of the New York and Harlem Railroad Company. In case of the death, removal or resignation of the said Campbell or Craven, or their or either of their successors, the vacancy shall be filled by the remaining members of the board. The said board are hereby authorized and directed to take the entire charge and control of the said improvement, and to execute the same in conformity with the provisions of this act, in a substantial

and workmanlike manner. The said engineers shall receive eight dollars each for every day that they shall be employed in the performance of their duties under this act. They may appoint one of their number as a general superintendent of the work. The said board shall prepare plans and specifications of said improvement in conformity with this act, and an estimate of the expense thereof, and file a copy of such plans, specifications and estimate in the office of the comptroller of the city of New York. The members of the said board, before entering upon the performance of their duties shall severally take and subscribe an oath or affirmation before some judge of a court of record in the city of New York, faithfully to perform the trust and duty required of them by this act and as a member of the said board of engineers, which shall be verified by such judge and filed in the office of the said comptroller.

SEC. 7. When the said plan, specifications and estimate shall be made and filed as aforesaid, the expense and cost of the said improvement shall be borne and paid by the New York and Harlem Railroad Company and the mayor, aldermen and commonalty of the city of New York in equal proportion as the construction of the said improvement progresses. When and as often as it shall appear by the certificate of the superintending engineer of the work upon the said improvement that the sum of twenty-five thousand dollars has been expended thereon by the New York and Harlem Railroad Company, specifying the portions and divisions of the said improvement where the said expenditure has been made, the comptroller of the city of New York shall draw his warrant upon the treasury of the said city in favor of the treasurer of the said railroad company for one-half of the said sum, which shall be duly signed and countersigned by the proper officers of the said city, and delivered to the said railroad company for and on account of the one-half of the expense and cost of said improvement to be borne and paid by the said city as aforesaid.

SEC. 8. For the purpose of raising the sum or amount of one-half of the estimated expense and cost of the said improvement, to be borne and paid by the city and county of New York, one-half of the proportion or amount to be borne and paid as aforesaid, or one-fourth of the whole estimated expense and cost, shall be raised by a tax upon the real and personal property subject to taxation in the city and county of New York, and included in the tax levy for the year eighteen hundred and seventy-two, and the remaining sum or one-half of the proportionate amount to be borne and paid by the said city and county shall be raised in like manner and included in the tax levy for the year eighteen hundred and seventy-three. The comptroller of the city of New York is hereby

authorized and directed to issue revenue bonds of the said city, in anticipation of the amount to be raised by taxation for the expense and cost of the said improvement in each year, to provide the means for paying the said proportion of the said city toward the said expense and cost, before the said tax shall be collected, not to exceed the due proportion to be borne and paid by the said city in each of the said years eighteen hundred and seventy-two and eighteen hundred and seventy-three; such bonds to be issued and sold at not less than par. So much of the proceeds of the said tax for each of the said years as may be necessary for the purpose shall be applied to the payment of the revenue bonds to be issued as aforesaid. It is hereby intended and declared that the payments by the city of New York are to be made in the proportion and as fast as they are made by the said railroad company during the progress of the work on the said improvement.

SEC. 9. The mayor, aldermen and commonalty of the city of New York are forbidden to obstruct the said improvement or the use of the Fourth avenue for that purpose above Forty-second street; and the said municipal corporation is hereby authorized and directed to pass and adopt such ordinances as may be requisite or necessary to facilitate the said improvement. Said tunnel and railways shall be exclusively for the uses and purposes of said railroad company, and it shall not be lawful for any person or persons, other than a public officer in the execution of his duty, as such, with his agents, and assistants, to enter or pass upon or through the same, or any portion thereof, on foot or in any other way than in the proper cars of this corporation provided for that purpose, without the consent of said corporation, under penalty of fifty dollars for each offense, to be recovered by this corporation.

SEC. 10. The said board of engineers shall begin the said improvement and proceed to the completion thereof with reasonable expedition. When completed the said railroad company are authorized and directed to run by steam their trains (and such trains of other railroads as shall have obtained the consent of the New York and Harlem Railroad Company) over the said improvement and the route of the said railroad, and in and upon their depot at Forty-second street, and the switches, turnout and sidings, now authorized by law, north of said street.

SEC. 11. The Legislature may at any time alter, amend, or repeal this act.

SEC. 12. This act shall take effect immediately.

CHAP. 339.

AN ACT to regulate, improve and enlarge Park avenue above One Hundred and Sixth street in the city of New York, and providing for the passage of intersecting streets, under the railroad structure of the New York and Harlem Railroad Company, and for the elevation of said railroad structure, and for changing the grade of said railroad, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary by reason of such change in structure and grade and increased elevation of bridge, and for other purposes.

Approved by the Governor April 19, 1892. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The grade of the New York and Harlem railroad between One Hundred and Sixth street and the Harlem river, as now established by chapter seven hundred and two of the laws of eighteen hundred and seventy-two, shall be changed and altered as follows: Commencing at or about One Hundred and Sixth street, the grade shall ascend going northwardly at the rate of forty feet per mile to One Hundred and Sixteenth street; and thence the grade shall descend, going northwardly, at the rate of twenty-four and seven-tenths feet per mile to One Hundred and Twenty-ninth street; thence still descending northwardly at the rate of twenty-nine and six-tenths feet per mile to a point about eighty feet southwardly from the present legally established bulkhead line on the south side of the Harlem river; thence going northwardly, the grade over the Harlem river shall be level at an elevation of twenty-six feet above high-water line of spring tides, to a point about eighty feet north of the present legally established bulkhead line, on the north side of the Harlem river; thence descending on a grade of not exceeding thirteen feet per mile to a point twenty feet south of the south line of One Hundred and Thirty-eighth street; thence still descending northwardly on a grade of not exceeding thirty-seven feet per mile to the south line of One Hundred and Forty-fourth street; thence still descending on a grade not exceeding twenty-nine feet per mile to the level of the roadbed of the New York and Harlem railroad, as now legally established and constructed, at or about the south line of One Hundred and Forty-ninth street.

SEC. 2. The viaduct structure, as it now exists between One Hundred and Sixth and the south side of One Hundred and Eleventh streets, shall be adapted to the new grade line as established by the preceding section, by raising its parapet

walls, and filling in with earth or other materials between the same, to the height required by the new grade; and from the south side of One Hundred and Eleventh street to the Harlem river, the railroad tracks and roadbed shall be carried on a viaduct structure of iron or steel, or of both of these materials combined, consisting of three lines of plate girders, supported on columns of iron or steel, standing on suitable pedestals of stone or brick masonry, with foundations under the same of timber piling, or concrete, as may be found necessary.

SEC. 3. The present depressed cut of the railroad, extending from One Hundred and Fifteenth street to One Hundred and Thirty-third street shall be filled in with earth or other suitable material, and its parapet walls taken down below the line of the under side of the avenue paving; and the bridge which now carries One Hundred and Sixteenth street, the roadway between One Hundred and Seventeenth and One Hundred and Eighteenth streets, the bridges which carry one Hundred and Nineteenth, One Hundred and Twentieth, One Hundred and Twenty-first, One Hundred and Twenty-second, One Hundred and Twenty-third, One Hundred and Twenty-fourth, One Hundred and Twenty-fifth, One Hundred and Twenty-sixth, One Hundred and Twenty-seventh, One Hundred and Twenty-eighth and One Hundred and Twenty-ninth streets over the said depressed cut, also the foot bridges over the same at One Hundred and Thirtieth and One Hundred and Thirty-first streets shall be removed, and the space between the exterior lines of the said parapet walls shall form a part of Park avenue, and be paved with stone paving of the same character and description as Park avenue is now paved, and shall be laid in accordance with the grades of Park Avenue, as now established, and the iron bridges which now carry the railroad tracks over One Hundred and Twelfth and One Hundred and Thirteenth streets shall also be removed, or be raised to the new grade line.

SEC. 4. The new viaduct structure of iron or steel, provided for by section two, shall be built at such height that all streets from and inclusive of One Hundred and Twelfth street to the Harlem river, shall be passed over with a clear height of not less than fourteen feet above the surface of the pavement, and One Hundred and Fourteenth, One Hundred and Fifteenth, One Hundred aud Seventeenth, One Hundred and Eighteenth, One Hundred and Thirtieth, One Hundred and Thirty-first, One Hundred and Thirty-second, One Hundred and Thirty-third streets and the exterior street along the bulkhead of the south side of the Harlem river, which do not now cross the said railroad, shall be opened, regulated and paved, and shall pass under the new viaduct structure the same as provided for all other streets in this section.

SEC. 5. The supporting columns of the new viaduct structure shall divide it into spans of about sixty-five feet center to center longitudinally with the railroad and be disposed in groups of three transversely at right angles, one column on the center line of the railroad, and one column on each side of said center line at a distance not to exceed twenty-eight feet each way between the center of said columns, excepting that at the crossings of One Hundred and Sixteenth and One Hundred and Twenty-fifth streets, and the exterior street (being one hundred feet in width) columns may be erected on the center line of said streets and also on the curb lines; and the said columns shall not exceed twenty-four inches by twenty-four inches of extreme external diameter above the level of the street pavement and shall be protected at their bases on the pavement with circular cast-iron wheel guards of sufficient diameter to defend the shafts of said columns from abrasion.

SEC. 6. The railroad tracks shall be carried on a solid tight floor, and the drainage water shall be conducted by pipes into the sewers.

SEC. 7. The New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company, is hereby authorized and permitted, at its election, to erect station-houses on both sides of the railroad at One Hundred and Twenty-fifth street, with platforms extending from the north line of One Hundred and Twenty-fourth street to the south line of One Hundred and Twenty-sixth street; and for the support of the girders to sustain such stations and platforms, columns may be erected along the curb lines of Park avenue, between One Hundred and Twenty-fourth and One hundred and Twenty-Sixth streets, and on the curb lines of One Hundred and Twenty-fifth street east and west of Park avenue as may be necessary, the said station columns not to exceed fifteen inches square in size above the surface of the pavement. The said stations and platforms shall be reached by stairs not less than five feet in width, which shall terminate on the side-walk pavement on both sides of One Hundred and Twenty-fifth street, east and west of Park avenue, and also upon the pavement on both sides of Park avenue adjacent to the north line of One Hundred and Twenty-fourth street and the south line of One Hundred and Twenty-sixth street. The station-houses may be built over the roadway of One Hundred and Twenty-fifth street, and may be of a length equal to the distance between the curb lines of the same.

SEC. 8. The Harlem river shall be crossed by the four tracks of the said railroad on a pivot draw-bridge, the center of which shall coincide with the center of the draw-bridge now standing, but the new bridge shall be so built that the lowest part of its structure shall have a clear height of twenty-four feet above

high water of spring tides, and shall provide passageway for vessels on both sides of the center pier, each of one hundred feet width in clear, measured at right angles to the axis or current of the river at the point of its passage under this bridge; the extreme ends of the draw-bridge shall be sustained on abutments of stone masonry, and a protection pier of proper width, to effectually protect the structure of the draw-bridge, when swung open for the passage of vessels, may be built in the river on a line parallel with the direction of the current of the river, no part of which, however, shall in any way diminish the clear width of one hundred feet passageway on both sides of the same.

SEC. 9. From the north abutment of the Harlem river bridge the new grade of the railroad shall be carried on a viaduct structure consisting of parallel retaining walls of stone masonry, with earth filling, to the south side of One Hundred and Thirty-eight street, with suitable openings for the passage of One Hundred and Thirty-fifth street and Mott avenue; over which streets the railroad shall pass on bridges of iron or steel supported on stone abutments; the railroad tracks shall be carried over One Hundred and Thirty-eight street on a bridge of iron or steel, of one hundred feet in width, divided into three spans consisting of one clear span over the roadway between the curb lines, and with side spans over each of the sidewalks supported on stone masonry abutments built upon the north and south lines of said street, and by iron columns on the curb lines.

SEC. 10. In order to secure fourteen feet clear of headroom under the lowest part of the bridge carrying the railroad tracks over One Hundred and Thirty-eight street, the grade level of One Hundred and Thirty-eight street as now established, shall be altered and be depressed under the said bridge, one and one-half feet, and the bridge which now carries One Hundred and Forty-fourth street over the depressed tracks of the New York and Harlem railroad may be raised to a height not exceeding seven and one-half feet above its elevation as now constructed, and the grades of the streets and avenues forming the approaches to the said bridge, that is to say, on One Hundred and Thirty-eight street between Mott avenue and Railroad avenue, and on One Hundred and Forty-fourth street eastwardly and westwardly from the railroad bridge, and on Railroad avenue northwardly and southwardly from One Hundred and Forty-fourth street, shall be altered and changed to correspond with the depression of One Hundred and Thirty-eighth street grade, and the raising of One Hundred and Forty-fourth street bridge, in such manner as may be prescribed by the municipal authorities having jurisdiction in the premises.

SEC. 11. North of the north abutment of One Hundred and

Thirty-eighth street bridge to One Hundred and Forty-ninth street the roadbed of the railroad may be raised to its new grade level by filling of earth, or in any other way, at the discretion of the railroad company.

SEC. 12. The New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company, during the making of the change in the elevation of the aforesaid structure and bridge is authorized to construct a temporary bridge over the Harlem river and to maintain such temporary structures as may be found necessary for the operation of its road, and to occupy any part or parts of any public streets or avenues in the city of New York necessary for such purposes, all of which, however, shall be done under the approval, direction and sanction of the board hereinafter appointed.

SEC. 13. There shall be a board whose duty it shall be to execute, direct and superintend the construction of the said improvement from One Hundred and Sixth street to the line of the Harlem river or point at which the new bridge over the Harlem river, authorized by this act to be constructed, shall commence, which board shall be called "The Board for the Park Avenue Improvement above One Hundred and Sixth Street." It shall be the duty of the said board to file a monthly statement under oath of the items of its expenditures with the comptroller of the city of New York. Regular accounts of all its transactions shall be kept by the board, which shall be open to the inspection of the officers of the said railroad company and to the comptroller of the city of New York. The said board is authorized to pass suitable by-laws for its own regulation and government, and to select a presiding officer and secretary from its number. It shall keep a record of all its proceedings. The said board shall consist of five members, to be appointed by the mayor of the city of New York, two of whom shall be civil engineers experienced in railroad and bridge construction. In case of the death, removal or resignation of any member of the said board, or their or either of their successors, the vacancy shall be filled by appointment by the mayor of the city of New York. The said board is hereby authorized and directed to take the entire charge and control of the said improvement from One Hundred and Sixth street to the line of the Harlem river, or the point at which the new bridge over the Harlem river authorized by this act, to be constructed shall commence, and to execute the same in conformity with the provisions of this act, in a substantial and workmanlike manner. Such work shall be done, so far as possible, by contract. Advertisements shall be made as the board shall direct, for bids or proposals for the work proposed from time to time to be contracted, and the contracts

shall be awarded to the lowest responsible bidder who shall be approved by the board. The contractors shall be required to give such bonds for the faithful performance and execution of the work as the said board shall require. Each member of the board shall receive ten dollars for every day that he shall be employed in the performance of his duties under this act. The board may appoint one of its number as a general superintendent of the work. The said board shall prepare plans of said improvement in conformity with this act, which when approved by the commissioner of public works shall be filed in the office of the comptroller of the city of New York. The said board shall also file with the comptroller specifications and an estimate of the cost of said work. The members of the said board before entering upon the performance of their duties, shall severally take and subscribe an oath or affirmation before a judge of a court of record of the city of New York, faithfully to perform the trusts and duties required of them by this act and as a member of the said board, which oath shall be filed in the office of the comptroller of the city of New York. All work to be done upon or under any street, between One Hundred and Sixth street and the south line of the Harlem river shall be done under the supervision of the department of public works, and the commissioner of public works shall appoint necessary inspectors and engineers for the supervision of such work, who shall be paid a reasonable compensation to be included in the cost of said improvement.

SEC. 14. When the said plan, specification and estimate shall be made and filed as aforesaid, the expense and cost of the said improvement shall be borne and paid by the New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company, and the mayor, aldermen and commonalty of the city of New York, in equal proportions as the construction of the said improvement progresses. When and as often as it shall appear by the certificate of the superintending engineer of the work of the said improvement, duly certified by the aforesaid board, that the sum of twenty-five thousand dollars has been expended thereon by either of said railroad companies, specifying the portions and divisions of the said improvement where the said expenditure has been made, the comptroller of the city of New York shall draw his warrant upon the treasury of the said city in favor of the treasurer of the said railroad company bearing and paying said expense, for one-half of the said sum, which shall be duly signed and countersigned by the proper officers of said city, upon whom by law is devolved the duty of signing and countersigning warrants, and deliver it to the said railroad company for and on account of the one-half of the

expense and cost of the said improvement to be borne and paid by the city as aforesaid; but in no event shall the proportion of the cost of said improvement to be paid by the city of New York, exceed the sum of seven hundred and fifty thousand dollars, and if the cost of said improvement shall exceed the sum of one million five hundred thousand dollars, then the entire excess over and above such sum shall be borne and paid by the New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company.

SEC. 15. For the purpose of raising the sum or amount of the cost of the said improvement to be borne and paid by the city of New York, it shall be the duty of the comptroller and other proper officers of the city of New York to borrow, from time to time, by the issue of bonds, bearing such rates of interest as they may deem proper, not exceeding four per centum per annum, payable semi-annually, such sums as may be necessary to pay the one-half part of all amounts called for by the certificates of the superintending engineer provided for in the preceding section of this act. Such bonds shall be known as assessment bonds for the Park avenue improvement above One Hundred and Sixth street. Such bonds shall be issued by the comptroller, when authorized by the board of estimate and apportionment, at not less than par, for such period as said comptroller may determine, not exceeding five years. Such bonds shall be sold by the comptroller by inviting proposals therefor by public advertisement for not less than ten days, and the same shall be awarded to the highest bidder therefor, and said proposals shall be only publicly opened by the comptroller in the presence of the commissioners of the sinking fund, or such of them as shall attend at the time and place specified in the advertisement therefor. The comptroller with the approval of said commissioners, shall determine what, if any, of such proposals shall be accepted, and upon the payment into the city treasury of the amounts due by the persons whose bids are accepted respectively, certificates therefor shall be issued to them as authorized by law.

SEC. 16. Upon the completion of such work and final payment by the comptroller of the proportion of the cost of said improvement to be borne by the city of New York, the mayor, aldermen and commonalty of the city of New York by the counsel to the corporation of said city, is hereby authorized and directed to make application to a special term of the supreme court in and for the first department, for the appointment of commissioners of assessment, and the said court shall thereupon name three discrete and disinterested persons, being citizens of the city of New York, as such commissioners of assessment, for the purpose of performing the duties herein-

after mentioned in that behalf prescribed. Twenty days' notice of such applications shall be published in the City Record and in at least two other newspapers published in the city of New York. Upon the appointment of said commissioners, they shall severally take and subscribe an oath or affirmation before some officer authorized to administer oaths, faithfully to perform the trusts and duties required of them by this act, which oaths shall be annexed to and filed with their report. In case of the death, resignation or refusal to act of any such commissioner of assessment, it shall and may be lawful for the court aforesaid, or any one of the justices thereof, on the application of the mayor, aldermen and commonalty of the city of New York as often as such event shall happen, to appoint a discreet and disinterested person, being a citizen of the city of New York, as such commissioner of assessment in the place and stead of such commissioner so dying, resigning or refusing to act, and the surviving or acting commissioners, as the case may be, shall have full power to proceed in the execution of their duties under their appointment until a successor of such commissioner so dying, resigning or refusing to act shall be appointed. It shall be the duty of said commissioners to view the improvement provided for by the terms of this act from One Hundred and Sixth street north to the Harlem river, and all such lands, tenements, hereditaments and premises as they may ultimately include within the area of assessment that may be fixed and determined by them, and shall proceed to determine the area upon which an assessment shall be imposed sufficient to meet and pay the entire amount of the assessment bonds which may be issued in pursuance of the provisions of section fifteen of this act, together with interest on such bonds to the date of the levying of such assessment, or such portion of said bonds and interest as the said commissioners of assessment shall determine should be paid by assessment. It shall and may be lawful to and for the said commissioners of assessment in their discretion, if they deem it equitable and just so to do, but not otherwise, to assess the whole or any part of the said bonds and interest upon the mayor, aldermen and commonalty of the city of New York. Any area of assessment shall be made so as to include all such lands, tenements, hereditaments and premises as may by said commissioners be deemed to be benefited by the said improvement, and no others; and having fixed such area and the amount of said bonds, and the interest thereon to be paid by assessment, it shall be the duty of the said commissioners to make a just and equitable assessment of the benefit to the respective owners, lessees, parties and persons respectively entitled unto or interested in the lands, tenements, hereditaments and premises included within the said area or assessment.

In each and all and every case and cases where owners or parties interested, or their respective estates and interests are unknown or not fully known to the said commissioners, it shall be sufficient for them to estimate and to set forth and state in their report in general terms the respective sums to be paid, without specifying the names of the estates or interests of such owners, proprietors or parties interested, or either of them. On the coming in of the said report, signed by said commissioners, or a majority of them, the said supreme court shall, by order, upon the application of the mayor, aldermen and commonalty of the city of New York, after hearing any matter which may be alleged against the same, either confirm the said report in whole or in part, or refer the same back to the same commissioners for revisal or correction, or to new commissioners to be appointed by the said court to reconsider the subject-matter thereof, and the said commissioners to whom the said report shall be so referred shall return the said report corrected and revised, or a new report to be made by them as aforesaid in the premises, to the said court, without unnecessary delay; and the same, on being so returned, shall be confirmed or again referred back by the said court as justice shall require; and such report, when confirmed by the said court, shall be final and conclusive as well upon the said mayor, aldermen and commonalty of the city of New York as upon the owners, lessees, persons or parties interested therein and entitled to the lands, tenements, hereditaments and premises mentioned in the said report, and also upon all other persons whomsoever.

SEC. 17. The said commissioners of assessment, at least thirty days before they present their report to the supreme court, shall deposit a true copy or transcript of the same in the office of the comptroller of the city of New York, for the inspection of whomsoever it may concern, and shall give daily notice, by advertisement in the newspapers mentioned in the sixteenth section of this act, for thirty days after depositing such report as aforesaid, of the said deposit thereof in the said office, and of the day on which such report will be presented to the said court; and any person or persons whose rights may be affected thereby and who may object to the same or any part thereof, may, within thirty days after the first publication of such notice, set forth their objections to the same in writing to the said commissioners, who shall, after hearing the parties so objecting, thereupon reconsider their said assessment or part or parts thereof so objected to, and in case the same shall appear to them to require correction, and not otherwise, they shall and may correct the same accordingly. The said commissioners shall include in said report the amount of their fees, and all costs and disbursements for expenses, for surveys, maps and other things.

SEC. 18. In each and every case of the appointment of commissioners under this act, it shall be competent and lawful for any two of such commissioners so appointed as aforesaid, to proceed and to execute and perform the trusts and duties of their said office, and their acts shall be as valid and effectual as the acts of all the commissioners so to be appointed, if they had acted together, would have been; and further, in all cases, the acts, proceedings and decisions of a major part of such of the commissioners as shall be acting in the premises shall be as binding, valid and effectual, as if the said commissioners appointed for such purpose had all concurred and joined therein. The commissioners appointed under and by virtue of this act, who shall enter upon the duties of their appointment, shall each be entitled to receive such compensation as shall be awarded by the court upon the confirmation of their respective reports, not exceeding ten dollars for each day they shall respectively be actually employed in the duties of their appointment, besides all reasonable expenses to be taxed and allowed by said court for maps, surveys, clerk hire and all necessary expenses and disbursements, and the same shall be included in and considered and paid as part of said assessment.

SEC. 19. The respective sums so as aforesaid assessed by the said commissioners upon the owners and occupants and parties seized or possessed of or interested in the lands, tenements, hereditaments and premises mentioned in the report of said commissioners, and reported by said commissioners as and for the payment to be made by the parties and persons respectively in the said report mentioned or referred to, and intended as owners and proprietors of or parties interested in lands and premises deemed to be benefited for the benefit and advantage to be derived from the said improvement, shall be a lien or charge on the lands, tenements, hereditaments and premises in the said report mentioned, or upon the estate and interest of the respective owners, lessees and parties interested in said lands, tenements, hereditaments and premises, for or on account of which the said respective sums shall be so assessed by said commissioners upon the respective owners and proprietors thereof, and parties interested therein; as well the said owners and proprietors thereof and parties interested therein, and also the occupants, and each and every of them, shall, moreover, be respectively liable to pay on demand the respective sum or sums or assessments mentioned in said report at which the respective lands, tenements, hereditaments and premises so owned and occupied by him, her or them, or wherein he, she or they are interested, or at which the owners or proprietors thereof shall be so assessed, to such person or persons as the comptroller of the city of New York shall appoint to receive the same. The said respective sums or

assessments, with lawful interest from the date of the confirmation of the report, may be collected, with all costs and charges by action of the said mayor, aldermen and commonalty of the city of New York from and against the parties assessed, or the owner or owners of the respective lands, tenements, hereditaments and premises whereof or in respect of which the same may be assessed or set forth in the said report of the said commissioners, or from or against any or either of the said parties or owners without joining any other or others of them, the said parties or owners.

SEC. 20. The moneys collected pursuant to the provisions of sections sixteen, seventeen, eighteen and nineteen of this act shall be set apart, when collected, as a trust fund, to apply to the redemption of the principal and interest of the bonds for the payment of which said assessment shall have been imposed. In the event that the said commissioners of assessment shall have, in pursuance of the provisions of section sixteen of this act, assessed the payment of the whole or any part of said bonds upon the mayor, aldermen and commonalty of the city of New York, the funds to pay the same shall be raised by tax upon the real and personal property subject to taxation in the city and county of New York, and included in the tax levy for the years in which the said bonds shall fall due. The interest on all of the said bonds shall be paid by the city of New York until the same shall fall due, and the amount thereof shall be raised from year to year, by tax upon the real and personal property subject to taxation in the city and County of New York but any interest that may accrue upon the aforesaid trust fund shall be applied in payment of said interest, and from the time that said trust fund shall be established, the balance of the interest only over and above the amount that may be earned from said trust fund shall be raised by taxation as aforesaid.

SEC. 21. The new bridge over the Harlem river, authorized to be constructed, by the provisions of this act, and the approaches to such bridge authorized to be constructed on the north side of the Harlem river in the twenty-third ward, shall be constructed at the sole expense of the New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company. The said railroad company shall prepare plans and specifications of said bridge and its approaches on the north side in the twenty-third ward in conformity with this act, and file a copy of such plans and specifications in the office of the comptroller of the city of New York. The said corporation is authorized and empowered to conform the structure of the said bridge to such plans and directions as shall be approved and given by the secretary of war, pursuant to authority conferred upon him by act of con-

gress, and except so far as the structure of said bridge shall be subject to the direction of said secretary of war, the plan therefor, and the approaches thereto on the north side in the twenty-third ward, shall be approved by the board appointed in pursuance of the provisions of this act.

SEC. 22. All changes in the railroad necessary to conform the grade thereof on the north side in the twenty-third ward, when elevated as aforesaid, to the new elevation, are hereby authorized and directed, and all grades of the said railroad established by any prior act or acts, or by any contract made by the railroad company owning, or leasing and operating said railroad, or by both, with any public department of the city of New York, or with the city of New York, pursuant to any act of the legislature, are hereby changed to conform to the provisions of this act.

SEC. 23. All bridges over the New York and Harlem railroad required to be made by any act or contract pursuant to any act of the legislature of the state of New York which will be interfered with by the change in grade of said railroad required by the provisions of this act, are hereby authorized to be removed except the bridge at One hundred and Forty-fourth street, which is authorized to be raised as aforesaid, and the obligation to make and continue the same, as imposed by any act or part of any act, or by any contract made pursuant to any act of the legislature of the state of New York, is hereby removed and annulled, anything in any act of the legislature of the state of New York, or in any contract made pursuant to any act of the said legislature of the state of New York, with any public department of the city of New York, or with the city of New York, to the contrary notwithstanding.

SEC. 24. The mayor, aldermen and commonalty of the city of New York, is hereby authorized and directed to pass and adopt such ordinances as may be requisite or necessary to facilitate the said improvement. Said improved structure and bridge shall be exclusively for the uses and purposes of the railroad company, and it shall not be lawful for any person or persons, other than a public officer in the execution of his duty as such, with his agents, or assistants, to enter or pass upon or through the same or any portion thereof, on foot or in any other way than in the proper cars of such corporation provided for that purpose, without the consent of said corporation, under a penalty of fifty dollars for each offense, to be recovered by said railroad corporation.

SEC. 25. The cost of the construction of all stations upon said railway, whether provided for in this act or not, shall be borne by the said railroad corporations or either of them, and shall not be included in the estimate to be made by said board of the cost of the proposed improvement from One Hundred

and Sixth street to the Harlem river, or the point at which the new bridge over the Harlem river authorized by this act to be constructed, shall commence.

SEC. 26. Said board shall begin the said improvement and proceed to the completion thereof with reasonable expedition. When completed, the New York and Harlem Railroad Company and its lessee, the New York Central and Hudson River Railroad Company so long as it remains such lessee, are authorized and directed to run by steam their trains and such trains of other railroad companies as shall have obtained permission therefor voluntarily given by either one of said companies which may be operating said railroad, over the said improvement and the route of the said railroad, and in and upon the depot at Forty-second street, and the switches, turnouts and sidings now authorized by law north of said street; and no trains of other companies, without such permission, shall be run thereon.

SEC. 27. The board appointed pursuant to the provisions of this act shall act upon any and all questions by a majority vote of its members.

SEC. 28. This act shall take effect immediately.

CHAP. 548.

AN ACT to amend chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety two, entitled "An act to regulate, improve and enlarge Park avenue above One Hundred and Sixth street in the city of New York, and providing for the passage of intersecting streets under the railroad structure of the New York and Harlem railroad company, and for the elevation of said railroad structure, and for changing the grade of said railroad, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary by reason of such change in structure and grade and increased elevation of bridge, and for other purposes."

Became a law May 8, 1894, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section four of chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two is hereby amended to read as follows:

SEC. 4. The new viaduct structure of iron or steel, provided for by section two, shall be built at such height that all streets from and inclusive of One Hundred and Eleventh street to the

Harlem river, shall be passed over with a clear height of not less than fourteen feet above the surface of the pavement, and One Hundred and Fourteenth, One Hundred and Fifteenth, One Hundred and Seventeenth, One Hundred and Eighteenth, One Hundred and Thirtieth, One Hundred and Thirty-first, One Hundred and Thirty-second, One Hundred and Thirty-third streets and the exterior street along the bulkhead of the south side of the Harlem river, which do not now cross the said railroad, shall be opened, regulated and paved, and shall pass under the new viaduct structure the same as provided for all other streets in this section.

SEC. 2. Section fourteen of chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two is hereby amended to read as follows:

SEC. 14. When the said plans, specifications and estimate shall be made and filed as aforesaid, or when any amended plans, specifications and estimate authorized by law shall be so filed, the expense and cost of the said improvement shall be borne and paid by the New York and Harlem railroad company, or its lessee, the New York Central and Hudson river railroad company, and the mayor, aldermen and commonalty of the city of New York, in equal proportions as the construction of the said improvement progresses. When and as often as it shall appear by the certificate of the superintending engineer of the work of the said improvement, duly certified by the aforesaid board, that the sum of twenty-five thousand dollars has been expended thereon by either of said railroad companies, specifying the portions and divisions of the said improvement where the said expenditure has been made, the comptroller of the city of New York shall draw his warrant upon the treasury of the said city in favor of the treasurer of the said railroad company bearing and paying said expense, for one-half of the said sum, which shall be duly signed and countersigned by the proper officers of said city, upon whom by law is devolved the duty of signing and countersigning warrants, and deliver it to the said railroad company for and on account of the one-half of the expense and cost of the said improvement to be borne and paid by the city as aforesaid; but in no event shall the proportion of the cost of the said improvement to be paid by the city of New York exceed the sum of seven hundred and fifty thousand dollars, and if the cost of said improvement shall exceed the sum of one million five hundred thousand dollars, then the entire excess over and above such sum shall be borne and paid by the New York and Harlem railroad company, or its lessee, the New York Central and Hudson river railroad company, except, nevertheless, that the mayor, aldermen and commonalty of the city of New York shall also bear and pay, in the manner in the act hereby amended

provided for, one-half of the expense of all work made necessary and done pursuant to any amended plans and specifications made and filed as provided for by this amendment to said act, in excess of the cost and expense of constructing or carrying out the said improvement in accordance with the plans and specifications heretofore made and filed; and the New York and Harlem railroad company, or its lessee, the New York Central and Hudson river railroad company, shall bear and pay, in the manner in the act hereby amended provided for, the remaining one-half of the said cost and expense; and the certificates of payment by either of said railroad companies, in this section hereinbefore provided for, to be made by the superintending engineer of said improvement, duly certified to by the aforesaid board, to cover any expense or cost that may be made necessary by any such amended plans and specifications, shall state the fact that the expense and cost in the said certificate specified was made necessary by such amended plans and specifications, and said certificates shall be conclusive evidence of such fact. But nothing herein contained shall be construed to obligate the city of New York to pay as its share of the work done under such amended plans and specifications a greater sum than fifty thousand dollars of such additional expense.

SEC. 3. In addition to the powers conferred upon the board for the Park avenue improvement above One Hundred and Sixth street, by chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two, the said board may, at any time within three months after the passage of this act, amend the plans, specifications and estimates of that part of the said improvement between the south side of One Hundred and Eleventh street and the south side of One Hundred and Fifteenth street, so that the space between the exterior lines of the retaining walls of the present railroad structure and between the south line of One Hundred and Eleventh street and the south line of One Hundred and Fifteenth street shall form a part of Park Avenue, and be paved as provided in section three of said chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two, and such amended plans, when approved by the commissioner of public works, shall be filed in the office of the comptroller of the city of New York. In such case the said board shall also file with the comptroller amended specifications of said work between the south side of One Hundred and Eleventh street and the south side of One Hundred and Fifteenth street in accordance with such amended plan; and an amended estimate of the cost of the entire work between One Hundred and Sixth street and the Harlem river, according to such amended plans and specifications. Upon the filing of such amended plans, specifications and estimate, the plans, specifications and estimate

heretofore made and filed shall be deemed to be amended accordingly. And the said board is hereby authorized, without advertisement, to make such supplemental contract or contracts, or such contract or contracts modifying any contract or contracts heretofore made by the said board with any contractor or contractors for any part of the work between the south side of One Hundred and Eleventh street and the south side of One Hundred and Fifteenth street, as may be necessary, in order to have the said work done in accordance with such amended plans, specifications and estimate. Nothing herein contained shall authorize the said board to change the grade of the New York and Harlem railroad between One Hundred and Sixth street and the Harlem river, as fixed and established by section one of chapter three hundred and thirty nine of the laws of eighteen hundred and ninety-two.

SEC. 4. This act shall take effect immediately.

CHAP. 594.

AN ACT to further amend chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two, entitled "An act to regulate, improve and enlarge Park avenue above One Hundred and Sixth street in the city of New York, and providing for the passing of intersecting streets under the railroad structure of the New York and Harlem Railroad company, and for the elevation of said railroad structure, and for changing the grade of said railroad, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary by reason of such change in structure and grade and increased elevation of bridge, and for other purposes."

Accepted by the city.

Became a law May 13, 1896, with the approval of the Governor. Passed three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section seven of chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two, is hereby amended to read as follows:

SEC. 7. The New York and Harlem Railroad company, or its lessee, the New York Central and Hudson River Railroad company, is hereby authorized and directed, to erect and maintain a station at One Hundred and Twenty-fifth street, and for that purpose to erect and maintain a station building in Park avenue, extending from the north line of One Hundred and Twenty-fifth street to the south line of One Hundred and Twenty-sixth street, forty feet in width, with suitable stair-

ways on the easterly and westerly sides thereof, not exceeding five feet in width. The northerly and southerly center line of the said station building shall be the centre line of Park avenue. Suitable sidewalks and curbs shall be laid on each end and side of the said station building, and there shall be left a clear roadway, between the curb on the easterly side of Park avenue and the curb on the easterly side of the said station building and between the curb on the westerly side of the said station building and between the curb on the westerly side of Park avenue and the curb on the westerly side of the said station building, of twenty-six and one-half feet in width. For the purposes of the said station at One Hundred and Twenty-fifth street, the said viaduct structure shall be of such width as may be necessary for the construction and maintenance of suitable platforms and station buildings between the tracks, and for the necessary approaches to such platforms and station buildings, but not to exceed eighty-two feet in width, except that the cross girders to sustain such platforms, station buildings and approaches, may be supported on columns erected along the curb lines of Park avenue between One Hundred and Twenty-third street and One Hundred and Twenty-seventh street, the said columns not to exceed fifteen inches square in size above the surface of the pavement. Suitable stairways, not exceeding five feet in width, shall also be erected and maintained from the south side of One Hundred and Twenty-fifth street to the said platforms and station buildings between the tracks. The plan of the said improvement heretofore approved by the commissioner of public works of the city of New York and filed in the office of the comptroller of the city of New York on the twelfth day of November, eighteen hundred and ninety-two, as amended and modified by the plan approved by the commissioner of public works of the city of New York, and filed in the office of the comptroller of the city of New York, on the twenty-first day of June, eighteen hundred and ninety-four, is, and shall be deemed to be, hereby amended and modified to conform to the provisions of this section, and as so amended and modified, is hereby authorized, ratified and confirmed, and the said, the New York and Harlem Railroad company, or its lessee, the New York Central and Hudson River Railroad company, is hereby authorized to take down so much of the structure heretofore erected between One Hundred and Twenty third street and One Hundred and Twenty-seventh street in accordance with the said plan of the said improvement filed in the office of the comptroller of the city of New York, on the twelfth day of November, eighteen hundred and ninety-two, as is not necessary or required for the purposes of the station in this section provided for.

SEC. 2. This act shall take effect immediately.

CHAP. 613.

AN ACT relating to and to further amend chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two, entitled "An act to regulate, improve and enlarge Park avenue above One hundred and Sixth street in The City of New York, and providing for the passage of intersecting streets, under the railroad structure of the New York and Harlem Railroad Company, and for the elevation of said railroad structure, and for changing the grade of said railroad, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary by reason of such change in structure and grade and increased elevation of bridge, and for other purposes," as amended by chapter five hundred and forty-eight of the laws of eighteen hundred and ninety-four and by chapter five hundred and ninety-four of the laws of eighteen hundred and ninety-six, and transferring all the powers of "the board for the Park avenue improvement above One hundred and Sixth street" to the commissioner of highways of The City of New York on and after the tenth day of March, eighteen hundred and ninety-eight.

Accepted by the city.

Became a law April 29, 1898, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. On the tenth day of March, eighteen hundred and ninety-eight, "the board for the Park avenue improvement above One hundred and Sixth street" created pursuant to chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two, shall deliver to the commissioner of highways of The City of New York all records, books, papers and maps in its office, or under its control, and upon the said tenth day of March, eighteen hundred and ninety-eight, the term of office of the said "the board for the Park avenue improvement above One hundred and Sixth street" and of each member thereof shall expire, and said board shall cease to exist on that day,

SEC. 2. From and after the said tenth day of March, eighteen hundred and ninety-eight, all the power and duties imposed or conferred upon the said "the board for the Park avenue improvement above One hundred and Sixth street" by the said act, or any amendment thereof, are hereby transferred to, and shall be devolved upon, and shall be performed by, the commissioner of highways of The City of New York.

SEC. 3. Nothing herein contained shall in any manner impair or affect any contract heretofore made by or with the said "the board for the Park avenue improvement above One Hundred and Sixth street," and any contract and all rights thereunder heretofore made by or with the said board, may be enforced in the name of "The City of New York" by the said commissioner of highways in the same manner and to the same extent that any such contract or any such rights thereunder might or could have been enforced by the said board under and pursuant to the provisions of the said act hereby amended or otherwise.

SEC. 4. Nothing herein contained shall relieve The New York and Harlem Railroad Company, or its lessee, The New York Central and Hudson River Railroad Company, from any costs, charges or expenses imposed upon the said railroad companies, or either of them, in and by the act hereby amended, or impose upon The City of New York any costs, charges or expenses not imposed by the said act hereby amended.

SEC. 5. This act shall take effect immediately.

Supreme Court.

THE PEOPLE *ex rel.* THE NEW YORK AND HARLEM RAILROAD COMPANY, *against* WILLIAM F. HAVEMEYER, Mayor of the City of New York. } 47 How. Pr. 494. September Term, 1874.

(495) WESTBROOK, *J.*: The New York and Harlem Railroad Company was created by a special act of incorporation, passed April 25, 1831, and various acts amendatory thereof and supplemental thereto, have since been enacted.

Prior to the passage of the act of 1872 (to enforce a duty devolved upon the respondent thereby, as is alleged, is the object of this application), the relator had located, constructed and operated a double-track railroad upon the Fourth avenue, in the city of New York. This was with the consent of the corporation of the city.

By chapter 387 of the Laws of 1859, entitled "An act to extend the charter of the New York and Harlem Railroad Company, and to determine the mode of using the same in the streets of New York," the corporation was "authorized, empowered and permitted to use steam in the drawing of their passenger and freight cars, upon their railroad on the Fourth avenue, to and from the northern extremity of Manhattan or New York Island to the south side of Forty-second street in said city, with turn-outs to their engine houses, respec-
(496) tively, for a period of thirty years from the 1st day of December, 1858."

Section 3 of the act just referred to "extended for the term of thirty years from the passage of this act, all the rights, privileges and franchises given and granted to the New York and Harlem Railroad Company, in and by their act of incorporation, passed April 25, 1831, subject to all the restrictions of the said act, except as herein modified."

Prior to the said act of 1859, the relator occupied the streets of New York with their railroad track, under a contract with the city, which bore date January 9, 1832. That contract enabled the common council of that city to determine when the railroad should become an obstruction and impediment to the enjoyment of the streets by the public, and to direct the railroad company to provide a remedy therefor under the penalty of the removal of its track.

When the Fourth avenue was originally occupied in part by the railroad, the sparseness of the population was such that such occupation gave but little inconvenience. As the city, however, expanded northward, it was found necessary to provide remedies for the danger and obstruction to the general public resulting from such occupation; and, with a view to a partial remedy, at least, by a law passed in 1867 (*chapter* 880), a portion of the avenue was arched over, leaving the railroad track below, at the joint expense of the city and the company. According to the evidence contained in the moving papers (and this is not denied), the completion of the work authorized by the act of 1867, was of great benefit; not only to the railroad company but to the city; so much so that it was deemed advisable to improve and grade the entire avenue, and, by means of sinking the tracks at points where it was practicable and bridging the avenue at others, to make the use thereof by the railroad company compatible with its proper use as a street by the public. To carry out this scheme the law of 1872, under which this proceeding is pending, was passed.

(497) By the first section of the act just referred to, the nature and character of the work which "the New York and Harlem Railroad Company is * * * authorized and required to" do is specified.

The second section authorizes the laying down of "such additional temporary tracks on the Fourth avenue, above Forty-second street, as may be necessary for the railroad business during the progress of the work;" and after providing for the removal of such temporary tracks when the work should be completed, it further authorized the company, "for the purpose of facilitating rapid transit and accommodating local traffic, to lay down permanently two additional tracks on said avenue, and to make such landings-excavations in said avenue as may be required for such additional tracks, with landings

for the entrance and delivery of passengers outside of the said excavations and viaduct."

By the sixth section, a board, to be called "the board of engineers of the Fourth avenue improvement," was created, to take charge of, manage and direct the work. It is made the duty of such board "to file a monthly statement, under oath, of the items of their expenditure, with the comptroller of the city of New York." By the same section, the members of the board are named, "Allen Campbell, Alfred W. Campbell, or their successors, and the chief engineer of the board of public works of the city of New York, and the engineer of the New York and Harlem Railroad Company"; directions are given for the keeping of minutes of their transactions; their compensation is fixed; provision is made to fill vacancies, and for the appointment of a general superintendent of the work. They are required to prepare plans and specifications of the improvement "and an estimate of the expense thereof, and file a copy of such plans, specifications and estimates in the office of the comptroller of the city of New York." And they were further required to take an oath, or affirmation, faithfully to perform their duties.

Section 7 provides that one-half of the cost of the work
(498) shall be borne by the New York and Harlem Railroad Company, and one-half by the city, as the work progresses, and, "when, and as often as it shall appear, by the certificate of the superintending engineer of the work upon said improvement, that the sum of $25,000 has been expended thereon by the New York and Harlem railroad (specifying the portions and divisions of the said improvement), when the said expenditure has been made the comptroller of the city of New York shall draw his warrant upon the treasury of the said city in favor of the treasurer of the said railroad company for one-half of the said sum, which shall be duly signed and countersigned by the proper officers of the said city, and delivered to the said railroad company for and on account of the one-half of the expense and cost of said improvement, to be borne and paid by the said city, as aforesaid."

Section 8 provides that the one-half of the estimated cost of the improvement which is to be borne by the city shall be raised by taxation upon the real and personal property, and one-half thereof shall be included in the tax-levy of 1872, and the other half in the tax-levy of 1873. The comptroller of the city is directed to issue revenue bonds to meet the amount to be paid by the city; and the section thus concludes: "it is hereby intended and declared that the payments by the city of New York are to be made in the proportion, and as fast as they are made by the said railroad company, during the progress of the work or the said improvement."

By the ninth section the city of New York is "forbidden to obstruct the said improvement, or the use of the Fourth avenue for that purpose, above Forty-second Street"; and the common council is "directed to pass and adopt such ordinances as may be requisite or necessary to facilitate the said improvement."

By the tenth section the board of engineers is charged with completing the improvement as rapidly as possible, and when completed the New York and Harlem Railroad Company
(299) and such other companies as obtain from it a right so to do, are authorized to run trains, by steam, over the various tracks, &c.

After the passage of this act the relator proceeded, under the direction of the said board of engineers (which board has pursued each and every step required by the law to be taken) to make the improvement.

The city of New York raised by tax, including it in its tax-levy of 1872, one-quarter of the whole estimated cost of the improvement; and there was collected and paid into the treasury of the city, the sum of $1,580,767.50, to meet its share of the cost of the work.

By the act of April, 1873, payments by the corporation of the city of New York must be made through the proper disbursing officer of the department of finance, on vouchers, to be filed in said department, by means of warrants drawn on the chamberlain by the comptroller and countersigned by the mayor. Connected with the finance department is an audit bureau, which, under the supervision of the comptroller, is required to audit, revise and settle all accounts in which the city is concerned as debtor or creditor, the chief officer of which is called the auditor of accounts.

On the 14th day of May, 1874, a certificate, precisely in conformity with the provisions of the act under which the improvement is making, was made out by the superintending engineer, and delivered to the comptroller of the city of New York, certifying that $276,466.70 had been expended upon the improvement, specifying the portions and divisions of the same where the expenditure was made.

The auditor of the bureau of accounts (Abraham L. Earle) having duly examined the certificate, certified a claim for one-half thereof to the comptroller, which latter officer drew a warrant for one-half the amount of the certificate of the superintending engineer, to wit: for $138,233.35, and duly signed the warrant; which warrant was also countersigned by the mayor.

(500) After the mayor (William F. Havemeyer) had countersigned the warrant, which, as before stated, was also signed by the comptroller (Andrew H. Green) he caused his

name to be taken therefrom, and now refuses to countersign the same, though he has been requested so to do.

The money wherewith to pay the said warrant was then, and is now, in the treasury of the city, and the application by the relator is for a peremptory mandamus against the respondent, to compel him to countersign the said warrant.

No disputed question of fact arises upon this application; no question of fraud, collusion or attempt to cheat the city out of a dollar is urged. There is no pretense but that the board of engineers has honestly, conscientiously and impartially done its duty, and that the warrant drawn by the comptroller which the mayor now refuses to countersign, represents just one-half the money actually and judicially expended by the relator in making the improvement required by the law of 1872. On the contrary, the opposition to the mandamus is based upon three grounds only: First, that a mandamus is not the appropriate remedy; second, that the certificate includes the cost of temporary tracks for running trains during the progress of the work, and sundry other items which, though lawful and authorized by the statute of 1872, are not proper to be charged to the cost of the improvement, for one-half of which the city is liable; and, third, that the law is unconstitutional, for sundry reasons and on various grounds urged and stated upon the argument, and which will be noticed in detail hereafter.

The full statement of the facts, which has been given, readily shows that there is here no question of fact to be sent to a jury for trial, and therefore, no alternative mandamus need be granted. The amount of money due from the city has been adjusted, determined and ascertained by a tribunal specially organized and created for that purpose, and which, composed as it was of men of conceded integrity, ability and learning, acting under the sanctities of an oath, was infinitely
(501) better qualified to discharge that duty than any court or jury possibly could be. Unlike a court, which, to ascertain facts, must rely upon the evidence of others, this board had personal knowledge of the truth and right of their judgment, the work having been done under their supervision and according to their plans. Unless, then, this application must fail and be defeated for the objections taken and hereinbefore stated, there is no reason why this court should not and ought not to dispose of the whole case, as involving questions of law only, and, if its views coincide with the position of the relator, grant the writ asked for in a peremptory form.

The objection that a mandamus was not the proper remedy was argued preliminarily and disposed of prior to hearing the argument upon the merits. It may not be improper, however, as this case is one of great interest, to state, briefly, the reasons which influenced that decision.

Assuming the validity of the act of 1872, the doing the work, the honest expenditure of the money and all the facts set out in the moving papers (all of which must be assumed in disposing of this preliminary objection), a plain duty was imposed upon the respondent by the statutes of this state—one which was imperative and mandatory—the non-discharge of which worked gross wrong and injustice to the relator. No other remedy was adequate and proper to meet the case. The taxpayers, and all the officers of the corporation, other than the respondent, had faithfully and completely discharged their various duties. The money had been collected and paid into the city treasury, the auditor, under the direction of the comptroller, had certified to the justice of the claim; the comptroller had drawn his warrant for the amount, and the only obstacle to its payment was the want of a countersignature by the mayor, who (all this must be conceded in asking a refusal of the writ on this ground), without reason and without cause, declines to affix his name to a warrant, which the law declares he shall do. What other remedy will meet this case? Granting for the sake of argument, that
(502) an action could be maintained against the corporation, for labor performed and moneys expended, under the act (which, as the law specially provides for the ascertainment of the claim, the mode of raising the money and its payment, I do not believe), what propriety is there in subjecting the municipality of the city of New York, as well as the relator, to the cost and expense of an action at law, to enforce a claim which every tax-payer and officer thereof, except the mayor, desires to have paid, and has done all in his power to have discharged.

Within every principle which has ever been held upon the writ of mandamus, it must be the proper remedy. No other will reach the evil, and devolve the costs of the proceeding where they belong, if the points urged upon the merits do not justify the mayor in refusing to perform the official act.

The reasons which influenced us in holding that a mandamus is the appropriate remedy in this proceeding, are fully sustained in *The People agt. The Supervisors of Columbia County* (10 Wend., 263), and *The People agt. Mead* (24 N.Y., 114; *see pages* 120, 121, 122, 123). In the latter case, Judge Denio, in commenting upon some decisions which have been strenuously urged to this court, says: "But I do not think these cases are fully in point against the plaintiff. None of them present a case of a proceeding prescribed by statute for raising money by a local tax for the benefit of a class of creditors when that proceeding has been carried on according to law nearly to its completion, where it has proved effectual in raising the money from the tax-payers, who were the proper parties charged with

its payment, and when the only step wanting to produce satisfaction to the creditor is the payment of the money so raised into his hands. If the defendants are allowed to persist in refusing to make payment on the ground that the relator has a right of action against the town, the anomaly would be presented of the legal pursuit by a creditor of money owing by the town, which it had already raised and collected
(503) from the tax-payers and placed in the hand of a public officer for the purpose of being paid to its creditors — all in the performance of specific statutory directions—but when, in consequence of the perversity of the official person whose duty it was made to pay it over, it could not be obtained by the creditor." This is the exact course of argument which influenced us in overruling the motion to dismiss the proceeding upon the ground that the remedy asked for—a mandamus—was not the appropriate one; and with a single further citation from the same opinion of judge Denio, in which he comments upon the other case we have cited (*The People agt. The Supervisors of Columbia County*), we close the discussion of this preliminary objection: "If the opinion should be thought to go too far in denying the liability of the county to an action, still, the case is an authority for holding that when a particular method of raising money for local public purposes is prescribed by statute, the party entitled to receive it has a right to the full and perfect execution of the power conferred, which may be enforced by the writ of mandamus."

But it is further objected (and this objection goes to the merits of the application), that the certificate given by the superintending engineer, and for the one-half of which the comptroller of the city drew his warrant, includes items not properly chargeable under the act of 1872, to the cost of the improvement. If this objection be well taken, the amount of the illegal charges embraced in the certificate is of no consequence, and hence the application for a reference to ascertain the exact amount of such improper charges was refused. The certificate could only include such items as the law aforesaid authorized, and if it was made up in part of sums unauthorized, the application for the writ would be refused if such amount was great or small. The items objected to are: 1st. The cost of maintaining temporary tracks to run the trains whilst the work progresses; 2d. The necessarily enhanced cost of doing the work whilst a portion of the avenue is occupied by operating the railroad; and to obviate which it
(504) is claimed that the trains should have been stopped at the Harlem river. 3d. The construction of two additional tracks to secure rapid transit; and, 4th. The ten per cent., which in the estimate of the entire cost of the improvement,

is allowed for contingencies. In regard to the latter item, no part of it enters into the certificate for which the comptroller drew his warrant—that representing money actually expended. The appearance of this in the general estimate of the whole cost of the work made prior to the commencement of the undertaking was proper and usual, to apprise those interested of the possible amount of money required. It was placed where it was so that a sufficient sum might be raised to cover any expenditure which the proper performance of the work made necessary, and to make the fund, against which the certificates were thereafter to be given, adequate for their payment. As to the other items something further will be said.

To the second point—that the cost of the work is necessarily enhanced by the occupation of a portion of the avenue during its progress by the operation of the railroad thereon south of Harlem river, and which increased cost by reason thereof, is admitted—the act itself furnishes a sufficient answer, in plain terms. The second section authorizes the laying down of "such additional temporary tracks on the Fourth avenue above Forty-second street as may be necessary for the railroad business during the progress of the work. From this express permission the inference is irresistible that the work was to be carried on with the Fourth avenue occupied in part by the business of the railroad. The legislature evidently supposed, as we can readily conceive, that the city was vitally interested in the uninterrupted flow of its commerce through this as one of its great arteries, and that such uninterrupted flow was of more pecuniary consequence to it than the enhanced cost caused by its interruption. If allowed to judge of the soundness of this legislative opinion, we would cheerfully announce ours to be in accordance with theirs. But we are not, as the
(505) fundamental law of the state has wisely committed such considerations to the sound wisdom and practical sense of the legislative department of the government; and it would ill become the judicial branch to say that such discretion could be lodged anywhere with more propriety or more safety.

As to the other two objections—the cost of the temporary tracks and the two additional permanent tracks to secure rapid transit—we think that they are not well taken. The first five sections of the act designated the improvement to be made, and what may and should be done during its progress. Among these is the one which provides for doing the very things, to the imposition of one-half of the cost of which upon the city objection is made. It is impossible to separate these acts from the others which are directed to be performed. After the character, nature and extent of the work has been indicated in these five sections, the next (the sixth) creates the board of engineers, "to execute, direct and superintend the construc-

tion of said improvements," and then sections 7 and 8 prescribe the share of the cost of "the said improvement," which the city is to sustain, and direct how the money shall be raised and paid out to accomplish the object. No rule of construction would justify the limitation attempted upon the words, "the said improvement." All had been previously specified as a part thereof, or as *proper to be done* in connection therewith; and if the legislature had intended that the city should bear one-half the expense of only a part of the work previously authorized or directed, it would certainly have so declared, and not use an expression which must necessarily cover all.

Neither does this construction work so great injustice to the city as the learned counsel for the mayor argues. The legislature of the state (*The People agt. Kerr*, 27 N. Y., 188) had power to authorize the relator to occupy the Fourth avenue with its tracks, and prescribe the mode of occupation. The permission to run cars over it, drawn by steam power, had been expressly conferred in 1859. Whatever control the city
(506) had over its occupation by virtue of the contract with the company, was given to it by the law chartering the company. It was perfectly competent for the same body, under whose permissive authority the city acted, to deprive it of that power and deal directly with the relator. It did so by the act of 1859, which unconditionally conferred the right claimed by the railroad. Such permission was not, as the learned counsel for the mayor argued, subject to the restrictions imposed by other acts, under and by virtue of which the city had undertaken to control the corporation in the use of the avenue; but such restrictions existed only, as the act declares, "except as herein modified." The act having in prior parts made express provision for the laying down of tracks, and the running of cars thereon by steam, and that, too, with the consent of the city, as it expressly declares; such use, granted for a term of years in an unqualified manner, must be deemed to be at least one of the modifications referred to. When the act of 1872 was passed, the legislature had before it the situation and rights of both the city and the relator. The former was vitally interested in the success and maintenance of the latter. The iron rail and the steam horse, which linked it to the great country of which it was the commercial center, were as important and vital to its growth as any of its other avenues which its wealth and enlightened public spirit have constructed. The improvement of this avenue, so as to admit of its use by the public and the railroad together, and the apportionment of the cost thereof upon some just basis, were the problems to be solved. Much of the work to be done properly belonged to the city, and much to the railroad. A separation of the one from the other in its execution would enhance the cost of

it as a whole, even though the part properly belonging to each could be accurately designated. Under such circumstances the law was passed by which the work was to be prosecuted as a unit, under one plan and a single superintendence, while the cost was equally divided between the two. If a part
(507) of the whole can be selected and an argument based upon it to prove the city pays a part of something it ought not to bear, so, on the other hand, doubtless, the railroad company might argue, as to some other part, that it paid for something which benefited the city only. The truth is that the work so runs together that its separation is impossible; and since the propriety of its execution is conceded by all, the apportionment of its cost could only be made by the legislative power in the exercise of its best judgment. We think it has acted wisely, equitably and justly; but if it has not, neither this nor any other tribunal has power to correct its errors. The work, when completed, will certainly not benefit the railroad company only, but the city equally as much. The exact proportionate benefit which each will receive can never be accurately ascertained. It is enough to know that both will feel that the money expended has been judiciously employed, and a division made of its cost by a body empowered to decide that question.

Having endeavored to show that the remedy sought is an appropriate one, and that, if granted, the city will not pay anything unauthorized by the law of 1872, let us now examine the various objections founded upon our federal and state consitutions. It is claimed:

FIRST. That it violates the clause of our national constitution, forbidding any state to pass a law impairing the obligations of any contract. It is argued that as the contract of January 6, 1832, between the city and the company, gave to the former the right to control the use of the avenue by the latter, the act of 1872, which takes from the city this power of control, substantially abrogates this agreement. To this we answer: First, whilst discussing the previous objections, it was shown that the contract was annulled with the consent of the city, by the law of 1859, which definitely conferred the right to use the avenue by the propulsion of cars, over the tracks constructed upon its surface, by steam. This grant was
(508) absolute, and absolved the company from its contract of 1832, which had therefore ceased to exist when the present statute was passed; second, assuming that the old contract of 1832 was in force when the present statute was passed, it was competent for the city, if the old agreement was thereby improperly nullified, to make its objections. It, as a natural person, can waive its right, and assent to a change or modification of its bargains. Like a natural person, it cannot fold its arms and make no objection when it ought to speak.

It saw the machinery of the law being put in operation by an estimate of the cost of the work filed in the office of its chief financial officer, and in all that was done before the work began, and in the conduct of the same to the present time, one of its own principal officers (the chief engineer of the board of public works) took a leading and active part. No objection or notice is given to the relator that the provisions of the law are not in good faith accepted; on the contrary, it is allowed to make a contract, on the faith of a supposed acquiescence by the city, involving millions—the tax imposed is levied, collected and paid into the city treasury—hundreds of thousands of dollars are paid by the city in ratification of the new agreement which the law embodies; and now, at this late day, this objection is made after every tax-payer and every officer of the city—not even excepting the mayor, who is now objecting—has expressly ratified and confirmed it. So far as it is possible for any being, natural or artificial, to waive any prior agreement, if one existed, the city of New York has done so, and the point now, for the first time taken, cannot prevail. But, third, the city has no rights under the contract of 1832, so far as the use of this avenue by the relator is concerned, which the state was constitutionally bound to respect. The city, as we have shown under a previous point (*People agt. Kerr*, 27 N. Y., 188), had control over the occupation by the railroad of the street by the force of a power conferred. The body which gave it the power could withdraw it and exercise
(509) it for itself. It has done so, and that takes no inherent or vested right from the city.

SECOND. It is said that it violates section 16 of article 3 of the constitution of this state, which declares: "No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in its title." The title of the act is "An act to improve and regulate the use of the Fourth avenue in the city of New York." The cases of *Brewster agt. City of Syracuse* (19 N. Y., 116), and of *Ferdinand agt. Mayor*, (50 N. Y., 504), cover this objection. In the latter case it is decided, "if the title of an act fairly and reasonably announces the subject, and that is a single one, and if the various parts thereof have respect or relate to that subject, the provisions of the constitution that no local or private bill shall embrace more than one subject, and that shall be expressed in the title (*state constitution, art.* 3, Sec. 16), is complied with. The degree of relationship of each provision is not essential if it legitimately tends to the accomplishment of the general purpose." And it was also in that case further held, "the general subject of local improvements includes not only the plan and construction

of contemplated work, but the means by which the work may be accomplished, the proceedings necessary to be adopted for assessing and paying the expenses, and the remedies to parties for redress of grievances arising out of their construction." Tested by these rules there is no difficulty. When this law was passed, the public and the railroad company were in the joint use of this avenue, and the act declared by its title its object to be to "improve and regulate" its use. No improvement could be made without cost to some one, and the reader of such title would naturally conclude that a tax would be levied somewhere to pay such cost; and as the use was principally confined to the two corporations, it could reasonably be conjectured where it would fall. And further, as the public and the railroad were both using the avenue, the
(510) portion of the title which indicated that its use was to be regulated would naturally direct attention to the body of the act to ascertain how it was thereafter to be used. Every section of the act relates to this single object, and the title could not be made any more specific without incumbering it with the details of the machinery devised for its execution, which the framers of the constitution did not contemplate, and did not intend.

THIRD. It is further argued that the law is in conflict with section 13, article 7, of the constitution, which declares: "Every law which imposes, continues or revives a tax shall distinctly state the tax, and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object."

If this objection is to prevail, what becomes of all the various statute laws authorizing city and village corporations throughout the entire state to make local improvements, appoint boards to assess and determine the cost, &c.? What of various others creating special commissioners to ascertain and assess debts and damages due third parties from counties, towns, &c., and then directing the levy and assessment thereof upon the locality which should pay? If the legislature can authorize a municipality to make an improvement, appoint commissioners to ascertain and distribute its cost among those which in their judgment should bear it, and in such proportions as they think proper—why can it not, instead of delegating such power to others, act directly, and determine that a certain improvement shall be made, establish a board to direct and control its execution, apportion its cost as it thinks proper, and provide for its payment? Is there any greater exercise of power in one case than in the other? If the power to do an act can be legally conferred, the body which can make the grant can exercise the right itself.

In *People agt. Mayor of Brooklyn* (4 N. Y. 420), by virtue of the power conferred in the charter of the city, Flushing
(511) avenue had been improved, and the cost of the improvement assessed in part upon certain parties supposed to be especially benefited, it was held this was a proper exercise of the taxing power. Will it be argued that, if an act of the legislature had directly ordered the same improvement, had created a board to plan and execute the work, and had declared in the law itself what proportion of the cost the whole city should pay and what part specific corporations and individuals should bear, that such act would not be equally valid with the one it did pass?

In *Town of Guilford agt. The Supervisors of Chenango County* (13 N. Y. 143), it was held that a law of the state appointing commissioners to ascertain the amount due from the town to certain parties, and directing the assessment of the amount awarded by the board of supervisors of the county upon the town, was a valid and constitutional enactment. That case, which, like the one we are considering, provided for the assessment of a tax, the amount of which was to be ascertained by the means specified therein, was certainly unconstitutional if the act of 1872 is, for the reason we are discussing.

Whatever plausibility the objection may have from the words of the section and article of the constitution upon which the same is predicated, and whatever apparent contradiction there may be between it and the case we have cited, are explained by the remarks of Denio, Ch. J., in *Darlington agt. Mayor, &c., of New York* (31 N. Y. 164; *see pages* 182, 183), who in commenting upon the same article of the constitution to which the learned counsel of the mayor has referred, says: "The article of which the section is a part relates to the state finances, and, taken together, it constitutes the financial system of the state, so far as concerns constitutional restraints. The affairs of cities and counties, so far as they are regulated by the constitution, are treated of in other provisions." And precisely this explanation disposes of *People agt. Board of*
(512) *Supervisors of Kings County* (52 N. Y. 556), in its applicability to the case before us. The court had then before it a law imposing a state tax for state purposes, and that law was, of course, amenable to the article of the constitution regulating that species of legislation. Its soundness is not questioned, but it does not sustain the point urged now.

FOURTH. The objection that the creation of the board of engineers to superintend this work is a violation of article 10, section 2, of the constitution, in relation to the appointment of certain officers, cannot prevail. If the point be well taken, then *The Town of Guilford agt. The Board of Supervisors of Chenango County* (13 N. Y. 143), before cited, was wrongly

determined. In that case the court of appeals had before it the constitutionality of a law appointing commissioners to determine the amount of a tax to be levied. So, also, if the position be sound, *Litchfield agt. Vernon* (41 N. Y. 123) and *People agt. Lawrence* (41 N. Y. 137), were wrongly decided. In these cases the constitutionality of an act creating a special board of commissioners to do certain things relating to the closing of the Atlantic street tunnel in the city of Brooklyn, and to assess the cost thereof, was affirmed.

It would not be difficult to answer the objection were it an original question; but such a discussion is neither profitable nor necessary in view of adjudged cases, which this court has no power to reverse.

FIFTH. Neither is the law obnoxious to the first article of the constitution, section 9, which provides: "The assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes." No "public moneys," in the sense in which the word "public" is used in that part of the organic law, are appropriated so as to make a two-thirds vote of the legislature necessary. The use of the words "public" and "local" in the same section forbids the thought that they are synonymous expressions, and the
(513) structure of the whole sentence is in opposition to the construction which attaches to each a similar meaning. It was very easy to say, if that was the thought intended, that "no tax shall be imposed for a local or private purpose upon the state or a locality, except by the vote of two-thirds of the members elected to each branch of the legislature." Instead of that, the expression indicates, as well as the requirement, that the assent of two-thirds of the members was necessary when the money belonging to the whole state was to be appropriated for the benefit of a part. This construction makes the provision reasonable and proper, and demonstrates that the "public moneys" referred to in the section are those belonging to the state, and that the clause of the constitution cited is no limitation upon the power of the legislature to assess or tax the cost of a local improvement upon a locality. Neither by the law is any "private property * * * * taken for any public use," so as to make article 1, section 6, of the constitution applicable. Taxation upon a locality for an improvement therein is the exercise of a different power—the taxing power—whilst the constitutional provision just cited refers to the taking of property by the right of eminent domain. This distinction, ever since the able and exhaustive opinion of Ruggles, J., in *People agt. Mayor of Brooklyn* (4 N. Y., 419), wherein it is most clearly stated and explained, has been well recognized in this state, and repeatedly followed since.

SIXTH. The last objection urged is that "chapter 702 of the Laws of 1872 is also unconstitutional and void in so far as it imposes the payment of this money upon the city of New York for the benefit of the Harlem Railroad Company, as the compelling of such payment is beyond the scope and purview of the legislative power."

Assuming the truth of the statement contained in the point urged, that the tax is for "the benefit of the Harlem Railroad Company," the objection is still without force. There is no such limitation on the taxing power of the legislature. In *Town of Guilford agt. The Supervisors of Chenango*
(514) *County* (13 N. Y., 143) before cited in answer to an objection that the law imposing the tax was a mere gift to the parties in whose favor it was imposed, judge Denio said: "The legislature is not confined in its appropriation of the public money, or of the sums to be raised by taxation in favor of individuals to cases in which a legal demand exists against the state. It can thus recognize claims founded in equity and justice, in the largest sense of these terms, or in gratitude or charity." In *Litchfield agt. Vernon* (41 N. Y., 123), also before quoted, judge Grover (*page* 134), speaking of the previously cited case, says: "In that case it was held that the legislature had the power to impose a tax upon the inhabitants to pay a claim that had no legal validity, and that could in no way be enforced against the town. In other words, that it was in the power of the legislature to impose a tax upon a locality for any purpose deemed proper, and that its power, in this respect, is not restricted by the constitution of the state." The opinion of Mason, *J.*, in *People agt. Lawrence* (41 N. Y., 137, *see pages* 140, 141, 142), is to the same effect. The case of *People agt. Batcheller* (53 N. Y., 128) does not conflict with these views. It simply decides that a law requiring a town, without the consent of its inhabitants, to become a stockholder in a railroad company, is unconstitutional.

But the objection assumes a fact which is not true. The provisions are not for the benefit of the relator, exclusively. This we have heretofore endeavored to show in this opinion. The proper improvement and use of the avenue by both the city and the railroad, and to make the one consistent with the other, were the results to be obtained. What part of the work justly belonged to the city, and what to the relator, it was difficult to define with accuracy; and the work to be done by each was so interlaced, that it was deemed wise to direct its construction under a single plan. Perhaps, from parts of this work the railroad receives the larger benefit, and from others the city. The legislature in its wisdom has assessed the one-
(515) half part upon each. This power is nothing different from what is exercised in behalf of municipal corpora-

tions every day. A street is opened and graded through agricultural lands. In such a case the amount to be paid by the city or village, as a whole, is always considerable, and yet the objection was never made, or if made, has never prevailed, that it was unconstitutional to tax the entire municipality for work, a part of which, at least, benefited individuals only. Such owners are presumed to pay for that part which specially benefits them in the assessments, which they pay for such benefits over and above their share of the general tax, to which they also contribute. So in this case the legislature has determined that one-half the cost of the improvement, over and above its proportion of the tax levied upon the city, should be paid by the relator as its share of the peculiar benefits resulting therefrom. It is not for this court to say that this apportionment is unjust. To that body, as the supreme arbiter under our constitution, has the right to decide been committed, and with its decision this court has neither the power or inclination to interfere. Doubtless, in the exercise of these great powers they will often err, as any tribunal, which is but human, will; but no system of government has ever yet been devised, and none ever will be established, which shall, in any department, always do exact justice, and whose lawful powers, if stretched to their fullest extent, might not work injustice in particular cases. In the grant of power, much must be conceded to the discretion, good sense and integrity of the individual or body to whom it is granted; but the concession of that which is fairly given should never be witheld, because extreme cases can be supposed in which it might be exercised with danger to the public. Practically, it will generally be found that the danger is largely imaginative, and the injury claimed to be done scarcely perceptible.

Before closing this opinion, it may be well to advert to another view, applicable as much to each of the objections urged, as to the particular one in connection with which it has been hereinbefore stated.

(516) Statutes and constitutional rights existing in favor of a party, natural or artificial, may be waived. May not the act of 1872 be regarded as the embodiment of an agreement between the parties, to which all have assented—upon which all have acted—and the withdrawal of either from which cannot be permitted, because by its conduct it has induced the other to incur responsibilities which, it may fairly be assumed, would not have been incurred if the other had not assented? The relator accepted the law by making the contract for the work, which the act required it to make. The city, through its officers, accepted it, by no protest against its provisions; by allowing the chief engineer of its board of public works to become a member of the board of construction, which

directed the work and controlled the expenditure; by using its machinery for the collection of taxes, to assess, levy, collect and receive into the city treasury its one-half of the cost; by drawing warrants and paying over a million dollars thereon; and, through its citizens by the payment of the tax levied for the city's share of the cost. Thus, all parties have agreed,—the city through every officer and every tax-payer. No rule of law and no rule of honesty, should permit objections to prevail which have been so fully and explicitly waived.

As against the respondent, however, the strength of the point founded upon the acquiescence of the city in the law of 1872, has not yet been stated. Every tax-payer in the municipality has not only assented to the act, but actually executed it. As a law imposing a tax, if it may be so regarded, it has already spent its force by the assessment and collection thereof, and the obtainment of the money for this purpose only. Every tax-payer has actually paid his, her and its proportion of the amount which the city was to pay of the cost of this great improvement into the city treasury, and all, except that part which has been paid over in execution of the law, still remains therein pledged to this object. It cannot be used for any other purpose without a fraud upon the parties from whom it was collected, and who paid it that this work should
(517) not fail. When the mayor refuses to countersign this warrant as the law commands, he refuses, not in order to protect his constituency from money oppressively to be taken against their will, but to defeat their wishes, and to appropriate their means to some use other than that to which they have pledged and dedicated it. His action in so doing is not only contrary to the desire of the relator, but to that of the body of the people whom he professes to represent and whose voice he should obey. The citizens of New York have a right that their means shall be used for the very purpose to which they have applied them, and none of their officers should be allowed to refuse to execute the trust which tax-payers, under the law, have committed to their official hands, in the belief that the provisions of such trust would be faithfully executed.

The result of my examination is, that the peremptory mandamus asked for should issue.

Supreme Court—General Term.

FELICE TOCCI, Appellant, *against* THE MAYOR, ETC., OF THE CITY OF NEW York, the New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, Respondents.	73 Hun, 46. November Term, 1893.

VAN BRUNT, *P. J.*—This action is brought by a tax-
(47) payer to restrain the city officials from paying to the railroad companies, defendants, certain moneys under the provisions of chapter 339 of the Laws of 1892, upon the ground that it imposes upon the city a contribution to the private railroad structure belonging to the defendant railroad companies, and is, therefore, unconstitutional. Upon the application for an injunction *pendente lite* affidavits were submitted upon both sides, and certain material facts controverted in those affidavits. In cases of this description it is much better practice where the right to a preliminary injunction has been denied, and there are disputed questions of fact, that the party should go to trial and settle the facts, and there determine the question as to the right to an injunction, rather than to attempt to procure a decision of the General Term upon a state of facts which may be entirely changed upon the trial, and unless a very clear case is made by facts which could not be found to be different upon the trial such an order should be affirmed.

In the case at bar upon an examination of the papers upon which this application was founded, and the answers thereto, it seems to us that there is no possible reason for our interference with the court below. The whole fallacy of the plaintiff's action is the assumption that the contribution of money by the mayor, aldermen and commonalty of the city of New York to the enterprise in question is a contribution to a private use. On the contrary, it would appear that it is a payment upon the part of the city for benefits and privileges received; and with the question as to whether the city has paid a high or low rate for what it has acquired we have nothing to do.

It appears that the defendants, railroad companies, were,
(48) prior to 1872, the owners of and operating on Fourth Avenue in the City of New York, steam railroads from Forty-fifth Street up to and across the Harlem river. In 1872 an act was passed giving the New York and Harlem Railroad Company a statutory grade between Forty-fifth Street and the Harlem river, an increased width of depressed roadway, and where the said roadway was to be in tunnel giving to the city and the people the full width of Fourth Avenue between Fifty-sixth and Ninety-sixth streets. Between Ninety-sixth street and

Harlem river, the railroad structure was to be upon a viaduct and in a cut inclosed by sidewalls with undercrossings between One Hundred and Second and One Hundred and Thirteenth streets inclusive, and over crossings from One Hundred and Nineteenth street to One Hundred and Twenty-ninth street inclusive. The said railroads crossed and were to cross the Harlem river slightly above highwater mark. By this act the railroad companies were given the exclusive use and occupation of said road, and persons were prohibited from entering or passing upon the same, or any portion thereof under a penalty. In 1890 an act of Congress was passed providing that the Secretary of War should cause the low bridges then crossing the Harlem river to be replaced by other bridges at the expense of the owners thereof *as soon as the necessary legislation*, if such legislation were necessary, should enable the change in grade to the approaches of said bridges to be made, the owners of said bridges to be allowed a reasonable time in which to complete the work necessary for such bridges, and said bridges to have a clear space between the under side thereof and the high water of spring tides of twenty-four feet.

To enable the railroad companies to comply with the act of Congress all that would have been necessary to be done, was to change the grade from One Hundred and Twenty-fifth street to the Harlem river, which would have been much less expensive to the companies than the plan hereinafter mentioned, provided for by the act of 1892. But had this method been adopted, no part of Park Avenue would have been returned to public use, and it would not have permitted the free and unobstructed passage of the intersecting streets from one side of the city to the other.

In 1892, in order to enable the said railroad companies to comply with the requirements of the act of Congress,
(49) the Legislature passed an act changing the grade of the road from One Hundred and Sixth street to and over the Harlem river to One Hundred and Forty-ninth street, making in the act various requirements in respect to the plans, specifications and estimates for said work, and to the method in which the work should be done. The act further provided that when the plans, specifications and estimates should be made and filed as therein required, the expense and cost of the improvement should be borne and paid by the defendant, the New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company, and the mayor, aldermen and commonalty of the city of New York, in equal proportions as the construction of the said improvement progressed. The act further provided that when and as often as it should appear by the certificate of the superintending engineer of the work of said improvement, duly

certified by a board provided to be appointed by said act, that the sum of $25,000 had been expended thereon by either of said railroad companies, specifying the portions and divisions of said improvement where the said expenditure had been made, the comptroller of the city of New York should draw his warrant, etc., for one-half of the same. The act further provided that in no event should the proportion of the cost of said improvement to be paid by the city of New York exceed the sum of $750,000, and that if the cost of said improvement should exceed the sum of $1,500,000, then the entire cost over and above such sum should be borne and paid for by said railroad companies. And, further, that said improvement structure and bridge should be exclusively for the uses and purposes of the railroad companies, and it should not be lawful for any person or persons other than a public officer in the execution of his duty as such, with his agents and assistants, to enter and pass upon or through the same, or any portion thereof, on foot or in any other way than in the proper cars of such corporation provided for such purpose, with the consent of such corporation, under the penalty of a fine, this provision being the same as that contained in the act of 1872.

It is urged upon the part of the appellant that the contribution imposed upon the city by the statute of one-half the cost of the structure from One Hundred and Sixth street to
(50) the river, declared to be exclusively for the uses and purposes of a private railroad company, is illegal and in violation of the Constitution. And our attention is called to the provision of the Constitution which, so far as it is applicable to the question now before the court is as follows:

"No * * * city * * * shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association, or corporation, * * * nor shall any such * * * city * * * be allowed to incur any indebtedness except for * * * city * * * purposes."

The argument of the counsel for the appellant is that the statute under consideration provides that the city shall contribute practically to two material works: *First*, the construction of a railroad structure, which is expressly stated to be exclusively for the use of the defendant company, that is, the New York and Harlem or the New York Central and Hudson River Railroad Company, and, *secondly*, the filling in, regulating and paving under that structure of some space and street crossings from One Hundred and Fifteenth street to One Hundred and Thirty-third street, and making the same part of the public avenue; and that if the second purpose is not within the prohibition of the Constitution, yet if it has been so inextricably mixed in the statute with the first purpose,

which is within such prohibition, that it is inseparable, and the entire provision is vitiated. It is further urged that in the case at bar, however, the purposes and objects are not so mixed as to defy judicial discrimination, either in principle or in fact, and, therefore, the unlawful can and must be set aside; for the provision, so far as it prescribes the contribution to the ostensible public work of filling in, regulating, etc., can be readily separated from the part imposing upon the city the payment of one-half the cost of the private railroad structure declared to be for the railroad's exclusive use and purpose.

We think, however, that in this statement of propositions the essential features of the improvement are lost sight of by the appellant. It is undoubtedly true that the expense attendant upon the opening, filling in, regulating and paving of Park avenue, released by the elevation of the defendant's railroad tracks, can be separated from the expense of building such elevated tracks. But this is by no means the whole of the improvement, nor is it the part of the improvement in
(51) which the city is most largely interested. These railroad companies were in exclusive occupation of a part of the public streets of the city of New York. It was deemed by the Legislature advantageous to the city of New York that such occupation should cease, and that these portions of the streets should be restored to public use, and that the interruption of communication between the two sides of the city should terminate; and they considered that the advantages to be derived from these changes and the others to be made by the railroad companies, which the Legislature had no power whatever to enforce upon said companies, were of sufficient importance to the city of New York to justify its payment of one-half of the expense of the improvement up to $750,000. It is entirely immaterial in the consideration of this question whether the railroad company owned the fee of the land which they occupied or not. For all practical purposes they were its absolute owners, and entitled to its absolute control and exclusive use for the purposes of their railroads. It was for the abandonment of these rights, and the expense of other constructions in their stead, that the city was authorized to make the payments provided for by the act.

The provision of the act, in regard to the payments to be made, that the certificate of the superintending engineer of the work of the improvement should specify the portions and divisions of said improvement where said expenditures had been made, was simply a method of determining as to how much money, under the provisions of the act, the city at any one time could be called upon to pay towards the improvement.

It was a matter of considerable moment to the city of New York as to whether unobstructed communication should be had

between the different sides of the city from One Hundred and Fifteenth Street to the Harlem River. The improvement was but one work. There were different things to be done in carrying out its design. But merely because a portion of the improvement required either the removal or the bringing upon the ground of earthy material, and another portion required the bringing upon the ground and the erection of iron structures, by no means segregated the parts of the improvement. They were, each and every of them, necessary parts of one design. The elevation of tracks and the improving of the street were parts of the same work; and it is to this
(52) one work that the city contributes. Even though the claim that the city contributes to the private structure of the railroad were true, if in consideration of such contribution the railroad surrenders rights which it had to public streets and avenues, and the Legislature chose to permit the city to buy out such rights by contributing to the expenses incurred because of such surrender, we see no possible constitutional objection thereto. It is merely paying a consideration for substantial advantages supposed to be gained. And we have nothing to do with the question whether the Legislature directed the city to pay a high or low price for the privileges which it acquired, or made an improvident bargain thereof, if their value is of such a character that an absolute gift cannot be inferred.

Now, it is conceded by the argument upon the part of the appellant that the acquisition of the streets occupied by the railroad companies and the establishment of uninterrupted communication between the two sides of the city are matters of great value, but, it is contended, not of the value which the Legislature directed the city to pay. Into this inquiry we cannot enter.

It is further urged upon the part of the appellant that, while the act is substantially granting a new franchise and use to these railroads, it contains no provision for a conveyance by the roads to the city or even a quit-claim deed or release of anything they then owned. But this in no manner affects the question. It is undoubtedly true, as was so ably shown by the counsel for the appellant, that the use of the streets by the railroad company, being abandoned because of their right acquired for an elevated railroad, the land in the street formerly occupied by them naturally and legally reverted to the city for street purposes. The conditions remained the same whether there was a formal release or a release by operation of law. The railroad companies surrendered their rights and accepted a new franchise, and the Legislature authorized the city to pay them not to exceed a certain sum for so doing. As

already stated, we see no constitutional objection to such a provision under the circumstances disclosed in the case at bar.

The order should be affirmed, with costs.

Follett and Parker, *JJ.*, concurred.

Order affirmed, with costs.

COURT OF APPEALS.

EMILY TALBOT, Appellant,
v.
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondents.
151 N. Y., 155.

Argued October, 1896; decided December, 1896.

BARTLETT, *J.*

This action is brought to enjoin the defendant corporations from maintaining or using the bridge over Fourth avenue on which Forty-eighth street crosses as a public highway and a certain protection wall adjacent to plaintiff's house in the same street; also to compel the removal of the bridge and wall.

(158)

In 1869 the plaintiff purchased a lot 250 feet west from Fourth avenue, on the north side of Forty-eighth street, and erected thereon a brown stone front house. Shortly after the erection of this house the New York and Harlem Railroad Company acquired title to all the land on the north side of Forty-eighth street, lying between plaintiff's premises and Fourth avenue; also a large amount of land on the south side of the street opposite the lot of plaintiff. On the 1st of April, 1873, the New York and Harlem Railroad Company leased to the New York Central and Hudson River Railroad Company its railroad, extending from Forty-second street along Fourth avenue to the Harlem River.

In 1872 the Legislature passed an act (Ch. 702) entitled "An act to improve and regulate the use of the Fourth avenue in the city of New York," for the purpose among others of rendering the same safe and convenient for persons crossing the same.

The act provided that the New York and Harlem Railroad Company should construct, at Forty-eighth street, a tunnel under the Fourth avenue for sidewalks and carriage ways, or a bridge over the same for a like purpose, and that the tunnel or bridge should be at least thirty-four feet wide. The act had for its general object the abolition of grade crossings to conserve the public safety, as it was contemplated to run trains from the Grand Central Station at Forty-second street to the Harlem River at a high rate of speed. It was a work

of public necessity, and involved a large expenditure, which was shared equally by the city of New York and the defendants.

The act appointed a board of engineersto execute, direct and superintend the construction of the improvements,
(159) to be called "The Board of Engineers of the Fourth Avenue Improvement."

This board was made up of five members, one of whom was the chief engineer of the board of public works of the city of New York for the time being, and another was the engineer of the New York and Harlem Railroad Company, and was authorized and directed to take entire charge and control of the work, and to prepare plans and specifications and an estimate of the expense, and file them in the office of the comptroller of the city of New York; they were also required to take an oath of office before a judge of a court of record and file it with the comptroller.

All these provisions were duly observed, and on the 30th of June, 1872, it was resolved by the board to authorize the construction of an iron bridge over the railroad tracks at Forty-eighth street. On the 25th of July, 1872, the board awarded a contract for this work to the Watson Manufacturing Company, in accordance with plans, etc., duly filed, and directed the New York and Harlem Railroad Company to execute the contract with that company. This was done, the bridge was constructed, and is the one complained of by the plaintiff. The bridge has approaches on its westerly side commencing opposite to the eastern boundary of plaintiff's premises and ascending upon the lines prepared by the board of engineers until they meet the iron structure spanning the avenue.

The bridge is thirty-four feet wide as the act requires, and is placed on the south side of the street, the latter being about sixty feet in width, thus leaving the north sidewalk and a strip of the surface roadway unoccupied by the new structure. In order to close this side of the street and prevent those traveling upon Forty-eighth street from injury in attempting to cross the railroad tracks at grade, and as a part of the official plan as filed, a wall of brick was constructed eight feet three inches high and about thirty-one feet long, beginning
(160) at the southeasterly corner of plaintiff's house, and extending over the discontinued portions of the sidewalk and roadway to the corner of the bridge structure.

The trial court found that the bridge had been used since its construction as a public highway both for carriages and foot passengers, and that its approaches have been kept paved and in order and the bridge lighted ever since by the corporation of New York. It is further found that the corporation defendants have not had the custody of, or maintained the

bridge or the wall, or used the bridge; that they have in several instances replaced bolts to prevent danger to passing trains, and repainted the iron work which had been disfigured by the smoke of the engines.

It is also found that the board of engineers were able and skillful men, and that the work was examined by them after completion and accepted as duly performed under the provisions of the act of 1872.

It was under this condition of affairs, and nearly twenty years after this work was begun, that the plaintiff instituted this suit, alleging she had suffered great damage by reason of the bridge and wall.

The trial court found that the effect of the wall was to prevent, to a certain extent, access of a carriage to the front steps of plaintiff's house, and that in the early morning it cast a slight shadow into the front basement room, but later in the day the reflection from the wall increased the light.

It was also found that the bridge itself did not injuriously affect the light, air or access to plaintiff's house; that the damage caused by the wall was inconsiderable, and that it could not be determined from the evidence given how much in money that damage had been, or how much resulted from the lawful occupation of its own land by the railroad company adjoining and opposite to the plaintiff's premises, and not forming a part of Forty-eighth street.

It is not necessary, however, to determine whether the court below properly disposed of the question of damages upon the evidence, as we are of opinion that the law, as applied
(161) to the admitted facts, imposes no liability on the defendants.

We have in this case a change of grade of one of the public streets of the city of New York, the fee of which was in the city, by command of the legislature, under the supervision of a board of engineers of its own creation.

The defendant company acted as the agent of the board, and conducted the work according to its plans and under its supervision and control. On the completion of the work and its acceptance by the board it has been maintained and used by the city of New York ever since as a part of its highway system.

These facts show that even if the plaintiff has suffered damage, and can compel removal of the wall and bridge, the defendants are not liable in damages, nor would a decree of removal against them be of any force or effect, as they are not in possession of the bridge, or maintaining or using the same.

We think, however, that the facts show no liability on the part of any one.

While it is a general rule that abutting owners upon city

streets, although not vested with the fee, are entitled to the use of the street for access and other purposes, of which they cannot be deprived without compensation, yet this right is subject to important exceptions. In the case of *Reining* v. *N. Y., L. & W. R. Co.* (128 N. Y., at page 165), Chief Judge ANDREWS, in a discussion of these exceptions as applied to a very different state of facts, said:

"The cases of change of grade furnish apposite illustrations. They proceed on the ground that individual interests in streets are subordinate to public interests, and that a lot owner, although he may have built upon and improved his property with a view to the existing and established grade of the street, and relying upon its continuance, has no legal redress for any injury to his property, however serious, caused by a change of grade, provided only that the change was made under lawful authority. This, it is held, is not a taking of the abutting owners' property, and the injury requires no compensation."

In the case at bar there is no closing of the street, nor
(162) is the plaintiff excluded therefrom within the principle of the *Story* case (90 N. Y. 122).

The abolition of the grade crossing was required for the public safety, and the wall shutting out the traveler from the north sidewalk and strip of roadway leading down to the railroad tracks was a necessary part of the work ordered by the legislature.

This wall stands upon the property of the defendants and the city.

The proposition that in this case there is no taking of private property for public use under the provisions of the Constitution and that the acts complained of are *damnum absque injuria*, has been frequently sustained by this court. (*Radcliffe's Executors* v. *Mayor, etc., of Brooklyn*, 4 N. Y. 195; *Bellinger* v. *N. Y. C. R.R. Co.*, 23 N. Y. 42; *Moyor* v. *N. Y. C. & H. R. R.R. Co.*, 88 N. Y. 351; *Uline* v. *N. Y. C. & H. R. R.R. Co.*, 101 N. Y. 98; *Atwater* v. *Trustees, etc.*, 124 N. Y. 602.)

The Supreme Court of the United States has also approved the rule. (*Smith* v. *Corporation of Washington*, 20 How. [U. S.] 135; *Transportation Company* v. *Chicago*, 99 U. S. 635, 641.)

The appellant discusses other questions which need not be considered in detail, as they have no direct bearing upon the main and controlling point in this case. The plaintiff's contention that the defendants unlawfully occupy that portion of Forty-eighth street which is barred off from public use by the bridge and wall is not relevant to this controversy; it is a question between the defendants and the city of New York if the latter's property rights have been invaded.

The bridge approach and wall were located by the state through its agents; and as to the strip of land shut off from public use, it was in no legal sense a closing of the street, but a necessary provision to turn the tide of travel upon the sidewalks and roadway over the bridge. There is no finding, as contended, that this wall during the last ten years, or
(163) for any other period of time, has been maintained by either of the defendants, but there is an express finding to the contrary.

It is not necessary to examine the question of the Statute of Limitations.

We agree with the learned court below that the plaintiff established no cause of action, and that the complaint was properly dismissed on the merits.

The judgment appealed from should be affirmed, with costs.

All concur.

Judgment affirmed.

Court of Appeals.

HANNAH CONABEER, Appellant,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY and The New York and Harlem Railroad Company, Respondents.
} 156 N. Y., 474.

Argued June, 1898; decided October, 1898.

Appeal from a judgment of the late General Term of
(476) the Supreme Court in the first judicial department, entered January 26, 1895, affirming a judgment in favor of defendants entered upon a decision of the court dismissing the complaint on the merits on trial at Special Term.

This action was commenced on the twentieth of November, 1891, to obtain an injunction perpetually restraining the further operation of the defendants' railroad in Park avenue, formerly known as Fourth avenue, in the city of New York, opposite the premises of the plaintiff, and for damages to the rental value thereof.

In 1807, by chapter 115 of the laws of that year, three commissioners were appointed who were empowered to lay out streets and avenues upon the northern portion of Manhattan Island, which included the locality in question. On April first, 1811, they filed a map showing the streets and avenues as they now generally exist. Upon this map One Hundred and Fourth street was shown to be of the width of sixty feet, and Fourth avenue of the width of one hundred feet. That act also provided that the map, plans and surveys so made and filed should be final and conclusive as to the mayor, aldermen

and commonalty of the city of New York, the owners and occupants of lands within the boundaries of the streets, and in respect to all other persons whomsoever. For many years after the filing of this map these streets remained unopened and had no existence, except that which resulted from their being designated as such on the map.

In 1831, by a special act of the legislature (Ch. 263),
(477) the New York and Harlem Railroad Company was incorporated, with power to construct a railroad from any point on the north bounds of Twenty-third street to the Harlem river, between the east bounds of Third avenue and the west bounds of Eighth avenue, with the right to operate it by steam, or by any mechanical or other power that the company might choose to employ. By that act it was given the right to locate its railroad and to file a map thereof in the office of the register of New York, but it was not to be filed until it should have been submitted to, and approved by, the common council. It was then authorized to build its road, to take all lands and real estate necessary for its construction, and to receive or take all voluntary grants or donations of land to aid in the accomplishment of that work. The act likewise provided that lands thus taken, which were not donated, should, if the parties could agree, be purchased of the owners at a price agreed upon between them, and then provided for condemnation when an agreement could not be had. It declared that the corporation was authorized to construct such a railroad, to use single or double tracks, and that in case its railroad was located along any public street or avenue then laid out upon the map or plan of the city of New York, it should leave sufficient space in the street on each side of the railroad for a public highway for carriages and a sidewalk for foot passengers. It also provided that the corporation should not be deemed to be authorized to construct a railway across or along any of the streets thus designated, whether open or not, without the consent of the mayor and aldermen, who were authorized to grant permission to the corporation to construct its railroad across or along the streets or avenues of the city.

The provisions of this act were complied with by the New York and Harlem Railroad Company, and it located its route along the center line of Fourth avenue, from Twenty-third street to the Harlem river, and filed a map in the register's office, October 22, 1831, together with a resolution of the common council, approved by the mayor, authorizing the company to construct its road over Fourth avenue. It obtained
(478) the consent of the municipal authorities to the location of such road by an ordinance approved by the mayor December 22, 1831.

At that time the locality which included the premises in

question consisted of farm lands and salt meadows, known as a part of the "Harlem Flats," a portion of which was owned by one Margaret McGown. On the eighteenth of January, 1832, Mrs. McGown conveyed to the New York and Harlem Railroad Company and its successors a portion of the land owned by her, consisting of twenty-four feet of land running through the center of Fourth avenue between Ninety-seventh and One Hundredth and Sixth streets for and during the period it might remain an incorporated company, on which to construct its railroad, but for no other purpose, with the right to slope its embankments or excavations so much farther beyond the line of the premises granted as might be necessary to support its work, not, however, to extend beyond the width of the avenue, which was one hundred feet.

Some time anterior to 1835, the railroad company constructed along this portion of Fourth avenue a stone viaduct upon the land in question, upon which two tracks were laid. The only difference between the old viaduct and the one now complained of is that the width of the latter was increased sixteen feet on each side, and accommodated two additional tracks.

In 1835, the matter of widening Fourth avenue from one hundred to one hundred and forty feet was brought before the common council by a petition requesting that the avenue be thus widened. One, if not the chief, ground upon which this was asked was the existence of the railroad in the center of that avenue. Subsequently, and in 1837, the street was widened to one hundred and forty feet.

Fourth avenue was not opened until nearly twenty years after the construction of the defendants' road over this part of it. In the proceedings for opening that street, the city of New York assumed to acquire the title to the strip of land upon which the defendants' road was constructed, and for which a nominal award of one dollar was made for each
(479) of the lots across which it passed. No attempt was made by the city to acquire the easements secured by the railroad company under its deed from Mrs. McGown, either as to its right to build and maintain its road along the strip purchased of her, or to slope its embankments and excavations so far as necessary to support the work. The possession by the railroad company of the portion of the street thus occupied was not attempted to be disturbed by the city. When the street was opened in December, 1853, the railroad was upon a high viaduct along the center of the avenue, which was in the exclusive possession of the New York and Harlem Railroad Company. The portion so occupied has never been used as any part of the public street.

In 1872, by chapter 702 of the laws of that year, the legisla-

ture passed an act to improve and regulate the use of Fourth avenue in the city of New York. That act authorized and required the railroad company to regulate the grade of its railroad in Fourth avenue in a manner specified, and to construct such viaducts, bridges, excavations, tunnels and openings as were therein described. It provided that from Fifty-sixth to Ninety-sixth street the railroad should run through a covered way with openings therein, and thence continue upon the grade as it then existed to the center of One Hundred and Fifth street. It also authorized the railroad company, for the purpose fo facilitating rapid transit and accommodating local traffic, to lay two additional tracks on such avenue, and to make such landings and excavations therein as might be required for the tracks and the entrance and delivery of its passengers outside of the excavations and viaduct. It created a board of engineers to execute, direct and superintend the construction of such improvement, the expense thereof to be borne by the city and the railroad company in equal proportions. It forbade the municipal authorities of the city from obstructing the use of Fourth avenue for that purpose above Forty-second street, authorized the municipal corporation to pass such ordinances as might be requisite or necessary to facilitate the improvement, provided that the railway be exclusively for
(480) the uses and purposes of the railroad company, and that the legislature might at any time alter, amend or repeal that act.

This improvement was carried on and completed under the direction of a board of engineers appointed by the legislature for that purpose. The height of the old viaduct at One Hundred and Fourth street, opposite the premises now owned by the plaintiff, was unchanged. The improvement at that point consisted in taking down the old viaduct and erecting a new one of the same height, but fifty-six feet wide. It was completed in 1873, in which year the New York and Harlem Railroad Company leased to the New York Central and Hudson River Railroad Company its railway for four hundred and one years. Since that time the railroad as then constructed has been in the possession of and operated by the latter company as such lessee.

In 1887, fourteen years after the improvement directed by the statute of 1872 was completed, the plaintiff purchased her lot at the corner of Fourth avenue and One Hundred and Fourth street. It was a part of the premises owned by Mrs. McGown in 1832 when she deeded the land in Fourth avenue to the Harlem Railroad Company. Upon the plaintiff's lot there was at the time of her purchase, and still is, a three-story and basement brick and stone building used as a dwelling house. Since June, 1887, she has been the owner in

fee and in possession and occupancy of the premises thus purchased.

Since the lease to the New York Central and Hudson River Railroad Company it has maintained and operated the railroad upon such viaduct and runs thereon a large number of trains during the day and night drawn by locomotives, and in its operation steam, smoke, noxious and unpleasant gases, vapors, coal, soot, cinders, ashes and sparks have been and are frequently emitted from such locomotives which fall upon the plaintiff's premises; loud and disagreeable noises have been and are produced by its operation; the free, steady and natural passage of light is interrupted, and dark shadows and
(481) bright flashes of light are produced. The viaduct and railway structure are of a lasting and permanent nature, intended for continuous and permanent use, and the defendants intend to continue to maintain, use and operate a railroad thereon.

The viaduct is about forty feet from the building line upon Fourth avenue. Of this, twenty-five feet in width on each side are used as a roadway for teams, carriages and other vehicles, and fifteen feet as a sidewalk. The street-line is now forty-two feet from such viaduct, while before the widening of Fourth avenue the street line was only thirty-eight feet from the viaduct as first constructed.

Joseph Ullman for appellant.

Ira A. Place, Alexander S. Lyman and *Hamilton Harris* for respondents.

(482) MARTIN, *J.* It is obvious that when the deed by Mrs. McGown to the New York and Harlem Railroad Company was given, it was understood between the parties that its railroad was to be built upon an embankment or viaduct in Fourth avenue, as it expressly provided not only that the grantee should have twenty-four feet of land in the center of the avenue during its corporate existence upon which to construct its railroad, but it also conferred upon the company the right to slope its embankment to the full
(483) width of the street. It is equally apparent that the grantor intended to confer upon the railroad company the right to construct, maintain and operate a steam railroad upon the premises so conveyed, and to thereby release it from any damages to her adjoining property arising from the proper exercise of that right. Thus the property now owned by the plaintiff which adjoins Fourth avenue became burdened with the easements or right of the company to maintain and operate its railroad at that place, so that neither the owner, nor her grantee, could recover damages for any injury to the property arising from the contemplated use, and could in no

way interfere with the proper exercise of that right by the railroad company during its continuance.

The only injury or interference with the premises now owned by the plaintiff was found by the trial court to have been caused by acts and conditions which were necessarily and naturally incident to the operation of a steam railroad. The court expressly declined to find that those acts and conditions deprived the plaintiff of her property in the avenue, or of the easements appurtenant thereto, or to find that access to the premises, or the approach of light and air thereto, was obstructed otherwise than by acts and conditions which were incident to the operation of the defendants' railroad. It also declined to find that the construction and operation of the defendants' railroad had diminished the value of the plaintiff's premises.

An examination of the evidence contained in the record shows quite plainly that the trial court was justified in declining to find that the plaintiff's access, light and air were obstructed, except in the manner stated. Therefore, the question presented is whether, under the proof contained in the record, the plaintiff was entitled to restrain the defendants from operating their road upon the viaduct in front of her premises, upon the ground that it affected them in the manner in which the operation of a steam railroad thus located naturally and necessarily would.

It is to be remembered that Mrs. McGown was the common source of title to both the plaintiff's and the de-
(484) fendants' lands, and that prior to her transfer of the premises now owned by the plaintiff she had transferred to the Harlem Railroad Company the right to build, maintain and operate its road in the center of the avenue where it is now located, thereby imposing upon the remainder of her land the burden of the presence of a railroad at that place to be maintained and operated as such. When she granted that right, it was the understanding of the parties that the premises granted were to be thus used, and was upon her part an irrevocable grant to the New York and Harlem Railroad Company and its successors of the right to so use the avenue during the period of the incorporation of that company. It in effect released to it any consequential damages to her remaining property which might be occasioned by the annoyances or injuries resulting from the operation of the road.

When that right was granted, Fourth avenue was but one hundred feet in width, and the viaduct or embankment first constructed by the defendants was at most but thirty-eight feet from the exterior street line. Since that time the street

has been widened to one hundred and forty feet, so that the street line is now forty-two feet from the defendants' viaduct.

It is claimed by the plaintiff that, as the New York and Harlem Railroad Company used only twenty-six feet of the avenue for the construction of its first viaduct, it waived any right it possessed in the remainder of the street, and, consequently, was entitled to maintain its viaduct upon that portion of the street only. Where a right is obtained by prescription, the measure of the right is controlled by the extent of the use. But where, as in this case, there is an express grant, the fact that the grant to its fullest extent is not immediately used will not amount to an abandonment or waiver of the rights thus expressly granted. Where one acquires a title by deed, it will not be affected by non-user unless there is a loss of title in some of the ways recognized by law. Mere non-user, however long continued, does not create an abandonment. (*Welsh* v. *Taylor*, 134 N. Y. 450; *Haight* vs. (485) *Littlefield*, 147 N. Y. 338.) Therefore, as between the plaintiff's grantor and the defendants, it is quite evident that the latter may exercise all the rights conferred upon them by the deed of Mrs. McGown, unless there has been a loss of that right in some of the ways recognized by law. There is no proof of any such loss. That the plaintiff's remote grantor, Mrs. McGown, surrendered the easements in Fourth avenue appurtenant to her abutting property, so far as the same were affected by the erection and operation of this railroad, there is no doubt, and the plaintiff could acquire no greater rights than were possessed by her. This court has several times held that a release or abandonment of the easements of light, air and access which are appurtenant to property abutting upon a public street may be established by any evidence which clearly indicates an intention upon the part of an abutting owner to abandon the right, at least where it has been acted upon by the other party. That the deed from Mrs. McGown to the defendant effected such a release and abandonment is obvious. (*White* vs. *M. R. Co.*, 139 N. Y. 19; *Foote* v. *M. E. R. Co.*, 147 N. Y. 367; *Ward* vs. *M. E. R. Co.*, 152 N. Y. 39.)

Although, under the statute of 1807, the commissioners appointed made a map which included Fourth avenue, still, until the street was opened and the damages to the owners of the land paid, the title remained in the latter. By the Laws of 1831 the Harlem Railroad Company was vested with power to purchase and hold such real estate as was necessary for the purposes of its incorporation, and was authorized to build its road in the public streets or avenues laid out on the map of the city. That act also provided that sufficient space on each side of the railroad should be left for a public highway for carriages and for a sidewalk for foot travelers. These rights

were reserved and granted, subject to the approval of the mayor, aldermen and commonalty of the city, which was obtained. In 1832, in pursuance of the power thus conferred,
(486) the New York and Harlem Railroad Company purchased the right of way of Mrs. McGown, to which we have referred, and the road was constructed thereon. In 1835, with the consent of the legislature, the municipality widened this street and opened on each side of the defendants' railroad streets for teams and foot travelers as required by the statute to which we have adverted. When this street was opened, the municipality assumed to acquire the title of the New York and Harlem Railroad Company to the property which it owned in Fourth avenue, awarding it therefor the nominal sum of one dollar upon each lot. At that time, however, the municipal authorities and the legislature recognized the right of the railroad company to continue its road in the street and in no way disturbed its possession or the exercise of that right. It is claimed that by this proceeding the city became vested with the title to the property of the railroad company, and, hence, that the deed from Mrs. McGown to the New York and Harlem Railroad Company was abrogated and its effect wholly annulled. This contention cannot be maintained. If it be admitted that the naked title to the land passed to the city, it is still clear that the consent of Mrs. McGown to the construction and operation of this road did not pass with it. That grant was at least an irrevocable consent to the use of the land for a specific purpose, which continued and remained in the corporation to which it was made. But if, as claimed, it passed to the city, so that the city had the right formerly possessed by the railroad company, then it is equally clear that the right still exists, and as the city has consented to the use of the street, Mrs. McGown and her subsequent grantee are yet bound by that grant. When the street was opened in 1853, the railroad was upon a high viaduct along the center of the avenue which was in the sole and exclusive possession of the railroad, and no portion of it was occupied as a public street. Therefore, whatever rights the city may have acquired, it is quite evident that, so far as Mrs. McGown was concerned, the right which she had granted to the railroad company never revested in her, and, consequently, neither she nor her grantees can assert the right thus released.

In 1872 the legislature passed an act adopting a plan
(487) for the improvement of Fourth avenue. By that act the railroad corporation was authorized and required to regulate the grade of its road, and authorized to lay two additional tracks for the accommodation of traffic and to facilitate rapid transit in the city. By the same act the officers

of the municipality were forbidden to obstruct the improvement or the use of Fourth avenue for that purpose. Therefore, not only the municipality consented to the improvement made in pursuance of that statute, but the legislature expressly authorized the use of the avenue for that purpose and to the width of the present structure, so that, unless the plaintiff has some right in the street which is superior to that of the defendants and to the combined power of the legislature and municipalty, this action cannot be maintained.

It is manifest that the only injury the plaintiff has sustained resulted from the proper use and operation of the defendants' steam railway; and as the plaintiff's grantor expressly conveyed to the defendants the right to maintain and operate it there, the plaintiff cannot recover for any injuries arising from that cause. The defendants' use of the street for the purpose of building, maintaining and opening its railroad was a legal one. It was constructed and is maintained and operated under and by virtue of the grant by Mrs. McGown and the combined authority of the legislature and municipality. "The Legislature, by virtue of its general control over public streets and highways, has power to authorize structures in the streets which, without such authority and under the common law, would be held to be encroachments or obstructions, and this power it may delegate to the governing body of a municipal corporation." (*Wormser* v. *Brown*, 149 N. Y. 163, 171.) As the appropriation of this street by the defendant for the purpose of constructing and maintaining its road was legal, no merely consequential damage to the owner of an adjoining lot, having no title to the street, furnishes a ground of action against the defendant. (*Fobes* v. *R., W. & O. R. R. Co.*, 121 N. Y. 505,
518.) Where a railroad is built in a public street or
(488) highway with proper care and skill, after the public rights and private property, if any, in the highway or soil have been acquired, the railroad is not responsible for any damages to private property necessarily resulting from its construction and operation. (*Uline* v. *N. Y. C. & H. R. R. R. Co.*, 101 N. Y. 98; *Conklin* v. *N. Y., O. & W. R. R. Co.*, 102 N. Y. 112.)

The cases of *Reining* v. *N. Y., L. & W. R. R. Co.* (128 N. Y. 157) and *Egerer* v. *N. Y. C. & H. R. R. R. Co.* (130 N. Y. 108) in no way impair the doctrine of the *Uline* and *Conklin* cases. Nor are they applicable to the facts in this case. In those cases it was held that the authorities of a city have no right to substantially close a street for ordinary street uses against an abutting owner, and that before an established street can be closed against such owner he would be entitled to compensation. In the case at bar the street at the place where the defendants' railroad was constructed was never opened or used

as a public street of the city. The streets in Fourth avenue were, by the command of the statute, laid out upon either side of the railroad structure, and were the only streets ever actually opened in that avenue. So that the plaintiff never acquired or possessed any right to the use of Fourth avenue as a public street, except such as she now enjoys.

This case is clearly distinguishable from the elevated railroad cases upon which the plaintiff relies. In those cases there was no grant by the abutting owners of the right to use the street for the purposes for which it was used, and the appropriation of the street was held to be illegal, while here the use of the street was legalized by a grant from the plaintiff's grantor, as well as by the legislature and municipal authorities. We are of the opinion that the grant to the New York and Harlem Railroad Company by the plaintiff's grantor is a substantial bar to the plaintiff's claim in this action. It is no answer to this position that the city subsequently, for a nominal consideration, obtained by condemnation the naked fee to the twenty-four feet of land deeded by Mrs. McGown to the New York and Harlem Railroad Company. In whomsoever the
(489) mere naked title to the twenty-four feet may rest, it is obvious, from the record, that the right to maintain and operate the defendants' road, with the consent of the plaintiffs' grantor, was not intended to be affected, but to remain in the defendants as a protection to their right, so long as the road was operated in that avenue and the time mentioned in the grant had not expired.

Under these circumstances, we agree with the learned trial court that neither Mrs. McGown nor her grantees, immediate or remote, can properly ask a court of equity to enjoin the operation of the defendants' railroad, to which her assent was thus expressly given. In *American Bank Note Co.* v. *N. Y. E. R. R. Co.* (129 N. Y. 252) this court held that where a public use authorized by law takes no land of an individual, but merely affects him by his proximity, the necessary annoyances of that use furnish no basis for damage. It was there expressly decided that noise was not an injury for which damage might be recovered, and that in that class of cases the abutter could recover only the damages to his easements of light, air and access. In *Wormser* v. *Brown* (149 N. Y. 163) this court determined that an interference with the view from the plaintiffs' windows would not entitle them to relief by injunction, and that the granting or refusal of equitable relief by way of injunction depends to a great extent upon the particular facts in each case, and is largely discretionary with the court in which the action originated. *In People ex rel. N. Y. & H. R. R.* v. *Commissioners of Taxes* (101 N. Y. 322) the judgment of this court was to the effect that the tunnels, tracks, superstruc-

ture, substructures, stations, viaducts and masonry of the defendants situated upon this avenue were land, within the meaning of the statute in reference to property liable to taxation, and that the fact that the city was required to pay a portion of the expense of the construction of the viaduct in question did not divest it of the incidents of other property belonging to the railroad company, or give the city any title to it, especially in *view of the fact* that the city was forbidden to obstruct the improvement or the use of Fourth avenue above Forty-second street for that purpose. Under the circumstances of this
(490) case, it is manifest that the abutting owners who derived their title from Mrs. McGown subsequent to her grant to the New York and Harlem Railroad Company were not entitled to have that portion of the avenue upon which the defendants' viaduct stands opened as a part of the public street, but that the only streets for public use which existed in Fourth avenue, or to the use of which they were entitled, were streets forty-two feet in width upon each side of the viaduct occupied by the defendants.

The plaintiff, however, contends that the increase in width of the viaduct from twenty-six to fifty-six feet was an additional burden upon the plaintiff's land, and, therefore, to the extent of such increase, the acts of the legislature and municipal authorities were unauthorized and the defendants' use of the street was an invasion of her rights as an abutting owner. Inasmuch as the trial court has properly refused to find that the plaintiff's easements of light, air and access were invaded or impaired, except by such acts and conditions as were incident to the operation of a steam railroad, to which her grantor consented, we think there was no such added burden as would justify this court in holding as a matter of law that the trial court should have awarded her relief by injunction. While the additional traffic over the defendants' road, resulting from an increased population and an enlarged business, may have added to the number of trains passing the plaintiff's premises, still, as it does not appear that the same number of trains might not have passed and the same traffic might not have been conducted upon the two previously existing tracks, and have been equally annoying and burdensome to the plaintiff's property, and as the consent of Mrs. McGown was unlimited in that respect, it would be difficult to determine the extent of any such added injury, if it exists, or to hold that it was not within the intention of the parties and covered by her grant.

Moreover, when the plaintiff purchased her premises, the defendants' viaduct had existed for many years, had occupied the entire portion of the street where it now stands, and
(491) was used substantially as when this action was commenced. She purchased the premises with full knowl-

edge of its existence, of its purpose and use, and with constructive notice of the defendants' rights. With that knowledge, presumably, she made the purchase for a price which included all proper deductions from its value by reason of the presence of the defendants' railroad, and, hence, lost nothing by being deprived of any of her otherwise appurtenant easements.

Under these circumstances we are of the opinion that the learned trial court was justified in declining to award to the plaintiff the relief demanded, and that this court cannot hold as a matter of law that the discretion of the court below was improperly exercised.

We have examined the various exceptions of the plaintiff relating to the reception and rejection of evidence, to the findings of the court and to the refusal of the court to find as requested, without discovering any that would authorize a reversal of the judgment or that requires further discussion.

The judgment should be affirmed, with costs.

All concur, except PARKER, *Ch. J.*, not sitting.

Judgment affirmed.

Court of Appeals.

MARY J. LEWIS, Appellant and Respondent,
against
THE NEW YORK AND HARLEM RAILROAD, Company, *et al.*, Respondents and Appellants,
Impleaded with the NEW YORK, NEW Haven and Hartford Railroad Company, Defendant.
} 162 N. Y., 202.

Argued January, 1900; decided February, 1900.

(218) VANN, *J.*: The plaintiff claims that the trial court erred in refusing to allow her damages for the effect of the new structures, both temporary and permanent, without considering the effect of the old structure. The defendants claim that the court erred in awarding any damages, or giving any relief whatever, to the plaintiff, because, as against her, they had the right to erect any railroad structure in the street, of any height, within the lateral lines of the old embankment.

The defendants' appeal rests mainly upon the proposition that, by virtue of the Benson deed to the Harlem Com-
(219) pany, in 1832, and possession thereunder for more than twenty years under claim of title exclusive of any other right, the defendants acquired title to the land upon which the steel viaduct now stands. (Code Civ. Pro., Sec. 369; *Baker* v. *Oakwood*, 123 N. Y., 16.)

The situation, when the Harlem Company entered Fourth

avenue and took possession of the strip of twenty-four feet covered by the Benson deed, was as follows: The section had been mapped under the act of 1807, as well as by Benson, and Fourth avenue had been laid down on both maps as one of the streets of the city. Benson had conveyed the entire avenue to the city for street purposes, reserving certain rights, and after thus conveying to the city had assumed to convey said strip to the Harlem Company exclusively for railroad purposes, but the conveyance was effective only as to his reserved rights. After conveying to the city, but before conveying to the company, he had conveyed, by reference to said maps, certain abutting lands to the plaintiff's predecessor in title. The avenue was not opened or built upon, as such, but was a street on paper only. The state and city had given the Harlem road the right to enter the avenue and lay down tracks on said strip, subject to certain drastic conditions, which gave the city supreme control, and to which the company had expressly assented, and, finally, the city had authorized the company "to take possession of the ground owned by the" former and had ordered the latter to construct its road thereon, with leave to use the street for "the purpose of a railroad and for that purpose only." The situation differs from that considered by us in a late case, as Benson had conveyed the street to the city and the abutting land to plaintiff's predecessor before he conveyed to the company, whereas in that case the first conveyance was to the company itself. (*Conabeer* v. *N. Y. C. & H. R. R.R. Co.*, 156 N. Y., 474.)

There is no evidence as to the character of the original entry into the street by the Harlem Company, or the nature of
(220) its claim when or after entering, except as it may be inferred from the facts above mentioned and the subsequent occupation and use for railroad purposes of a portion of the avenue, which was a street *in posse* only and did not become a street *in esse* until twenty years later. Under these circumstances the entry and occupation by the company must be "deemed to have been under and in subordination to the legal title" of the city. (Code Civ. Pro., Sec. 368; Code Pro., Sec. 81; 2 R. S., 293, Sec. 8.) Occupation must not only be hostile in its inception, but it must continue hostile, and at all times, during the required period of twenty years, challenge the right of the true owner in order to found title by adverse possession upon it. The entry must be strictly adverse to the title of the rightful owner, for if the first possession is by permission it is presumed to so continue until the contrary appears. If the occupation begins with recognition of the real owner's estate it is presumed to be subservient, and that the one making the entry intends to hold honestly and not tortiously. The character of the possession depends on the in-

tention with which entry is made and occupation continued. There is no *disseisin* until there is occupation with intention to claim title, and the fact of entry and the *quo animo* fix the character of the possession. The burden of proving all the facts necessary to constitute adverse possession is upon the one who asserts it, for in the absence of such proof possession is presumed to be in subordination to the true title. (*Brandt* v. *Ogden*, 1 Johns., 156; *Smith* v. *Burtis*, 6 Johns., 197; *Jackson* v. *Johnson*, 5 Cow., 74; *Jackson* v. *Brink*, 5 Cow., 483; *La Frombois* v. *Jackson*, 8 Cow., 589; *Humbert* v. *Rector, etc., of Trinity Church*, 24 Wend., 587; *St. Vincent Female Orphan Asylum* v. *City of Troy*, 76 N. Y. 108; *Doherty* v. *Matsell*, 119 N. Y., 646; *Kneller* v. *Lang*, 137 N. Y., 589; *DeLancey* v. *Piepgras*, 138 N. Y., 26; *Heller* v. *Cohen*, 154 N. Y., 299, 311; Tyler on Ejectment, 860; Buswell's Lim. & Ad. Poss., 380; Am. & Eng. Encyc. of Law (2nd ed.), 778.)

The entry by the Harlem Company was by the express permission of the city, under a resolution which recited that
(221) the land entered upon was at the time owned by the city. The occupation was permissive from the outset, and as there is no adequate evidence to the contrary, is presumed to have so continued ever since. The company recognized the title of the city by assenting to resolutions passed by the common council both before and after it accepted the deed from Benson. There was no open or notorious assertion of title under that deed, and no evidence of intention to claim title thereunder, except the deed itself, which was not recorded until after the railroad was built. There is no evidence that the city had notice, either actual or constructive, of that deed until the condemnation proceedings of 1850, when a nominal award was made to the company for its interest in the fee of the street. By an agreement duly executed under its seal, the company expressly covenanted that if permitted to occupy Fourth avenue, it would remove its railroad from the street wherever the city required it. It entered under a licence and remained under a license. Its unbroken continuity of possession from that day to this has never been accompanied with the assertion of any claim hostile to the city, for its deed from Benson, under the circumstances, is no evidence of a hostile claim, but simply that it had acquired Benson's reserved rights, which cut no figure in this controversy. Possession to be effective must be hostile to the rightful owner, and if the company intended to base a claim upon a deed in hostility to the city, the circumstances required it to make the fact known to the city, as otherwise its possession is presumed to be in accordance with its agreement. (*Treadwell* v. *Inslee*, 120 N. Y., 458). The city did not

know that the company had repudiated its agreement and stood on the Benson deed, exclusive of any other right, if such were the fact. It did not know of the existence of that deed, for the record was no notice, as a land owner is not compelled by the Recording Act to watch the records for conveyances of his own property. To authorize the presumption of a grant, the enjoyment "must not only be uninterrupted for the
(222) period of twenty years, but it must be adverse, not by leave or favor, but under a claim or assertion of right, and it must be with the knowledge and acquiescence of the owner." *Flora* v. *Carbean*, 38 N. Y., 111; *Bedlow* v. *N. Y. F. Dry Dock Co.*, 112 N. Y., 263; *Parker* v. *Foote*, 19 Wend., 313). When the occupant is in possession under two instruments, one subservient and the other hostile to the true owner, such possession, in the absence of positive notice to the contrary, will be regarded as subservient only, for the law raises a presumption in favor of an honest and against a dishonest purpose. This disposes of the appeal brought by the defendant, so far as it requires discussion apart from the claim of the plaintiff.

The plaintiff's appeal rests upon the proposition that she is entitled to the same relief that she would have been if there had been no railroad structure in the street prior to the erection of the steel viaduct. It would be sufficient to say in answer to this claim that as she asks aid from a court of equity, she can enforce her claim only so far as it is equitable, in the sense of being just. When she crosses the line of equity and good conscience to ask for compensation on the same basis as if Park avenue had never been a railroad street and seeks to recover damages which she has not suffered, on the ground of an alleged technical right, she must withdraw from a court of equity and seek relief at law. Since she or her predecessors submitted without complaint or question to the erection of two railroad structures in front of her property, each of which stood there for more than twenty years and wholly occupied the central portion of the street to the exclusion of all traffic therefrom, it would not be just to claim the same damages for injury to her easements by the third structure that she could properly have claimed if those easements had not been impaired by the previous structures. She has been awarded all that is equitably her due, which is the net difference, measured in money, between the effect of the old and the new structure while in actual use, less the benefits conferred by the latter. She has also been granted an injunction to protect her hereafter, unless her permanent damages are paid
(223) upon the same basis. A court of equity will give her no further relief.

But we will not stop here, for we wish to place our decision

upon grounds equally tenable in either jurisdiction. While the defendants acquired no right by adverse possession, as against the city, they acquired certain rights by prescription as against the abutting owner.

The leading facts bearing upon the subject may be summarized as follows: The lands embraced within the lines of Fourth avenue, as originally laid out upon the maps of the city and of Benson, were, by various conveyances, resolutions of the common council and acts of the legislature, so devoted to street purposes that they could not lawfully be used for any inconsistent purpose. (*Matter of Vil. of Olean* v. *Steyner*, 135 N. Y., 341, 345; *Lord* v. *Atkins*, 138 N. Y., 184, 191; *Haight* v. *Littlefield*, 147 N. Y., 338, 342.) The easements of light, air and access, so far as they had any practical existence prior to 1853 when the avenue was opened, were encroached upon by the first railroad structure, which, in front of plaintiff's premises, was a solid embankment 28 feet wide at the bottom and 10 or 12 feet high, walled in with stone. From 1853 until 1873, when the first improvement required by statute was made, the avenue was open and used as a street on either side of the railroad structure in the center, which continued to encroach upon the easements of the abutting owners. From 1873, when the embankment was converted into a viaduct 56 feet wide and 7 feet high in front of the *locus in quo* until 1894, when the last improvement required by statute was begun, the same encroachment continued. As to the plaintiff and her grantors there was an open, continuous and exclusive possession and enjoyment by the railroad company of the easements in question to the extent of the user during the periods named.

Prescription rests upon the presumption of a lost deed, after adverse use and enjoyment for twenty years, which has been adopted by the courts as the prescriptive period from analogy to the Statute of Limitations. (*Woodruff v. Paddock*, (224) 130 N. Y. 618, 624; *Snell v. Levitt*, 110 N. Y. 595; *Nicholls v. Wentworth*, 100 N. Y. 455; *Ward v. Warren*, 82 N. Y. 265; *Parker v. Foote*, 19 Wend. 309, 312; Goddard on Easements, 90; Washburn on Easements [4th ed.] 123; 19 Am. & Eng. Encyc. of Law, 7; Jones on Easements, Sec. 160; Gerard on Titles, 745.) What the primary owner loses by his *laches* the other party gains by continued possession without question of his right. (*Campbell v. Holt*, 115 U. S. 620, 623.) The adverse use must be of the same character and duration as the adverse possession required to give title to real estate, which has already been considered. If the presumption as to a lost deed may be rebutted, still it presents a question of fact which, in this case, has been determined in favor of the defendants. The possession of the defendants was not subordinate to the plaintiff's title, nor permissive as

to her, but openly hostile and necessarily known to be such, to her and her grantors, who made no objection until 1897. It was exclusive, definite and uninterrupted, for it absolutely excluded all from the part of the avenue occupied by the railroad structures. The obstruction was not out of view or knowledge, but in plain sight of the abutting owners, who, by making no objection, acquiesced in the situation. The question does not arise between the railroads and the city, which had consented in advance to the occupation, but between the railroads and the abutting owners, who had not so consented.

Under these circumstances the old structures had stood in the street so long that the railroads acquired a prescriptive right to have them stand there forever, so far as the plaintiff is concerned. The situation was the same in effect as if one of her grantors, while he owned her property, had conveyed to the defendants the right to permanently keep the stone viaduct where it stood and to use it indefinitely for railroad purposes. To the extent of the user by the companies the plaintiff, through the acquiescence of herself and her grantors, had parted with her rights when the present structure was erected. She could claim no damages on account of the old structure, so long as it stood there. She could claim
(225) no damages on account of any new structure erected in the same place, within the same lines, and for the same purpose, which inflicted no more injury upon her property than the old. She could raise no question except such as she could have raised had she given a deed expressly assenting to the erection of the old structure. (*Conabeer Case, supra.*) Had the new structure been no higher than the old, in front of her property, none of her rights would have been invaded, and she would have been entitled to no relief. These views are not inconsistent with but are in accordance with the principles of a case relied upon by the plaintiff, where the defense of prescriptive right failed because the facts failed, as adverse user was not found to have existed for the requisite period. (*American Bank Note Co. v. N. Y. El. R. R. Co.*, 129 N. Y. 252.)

The reason why possession of the same structure was adverse to the plaintiff but not to the city, is that the former never consented to the occupation, except by acquiescence during the prescriptive period, while the latter consented to the occupation in advance, and renewed the consent by subsequent acts at frequent intervals, while the railroad company never gave notice, direct or indirect, that it claimed to occupy under its deed or otherwise than by the consent of the true owner.

Prescriptive rights, however, are measured by the user, and the defendants could make no further encroachment without liability. (*Prentice v. Geiger*, 74 N. Y. 341; *Baldwin v.*

Calkins, 10 Wend. 169; *Bealey v. Shaw*, 6 East, 208; *Stiles v. Hooker*, 7 Cow. 266.) As was said by Judge Andrews in *Prentice v. Geiger* (*supra*): "The right is supposed to have had its origin in a grant, and the grant being lost, the user is the only evidence of the right granted, and as the presumption of a grant only exists where there has been an adverse, continuous and uninterrupted user, according to the nature of the easement claimed, for the period of twenty years, the prescriptive right is confined to the right as exercised for that period of time." The plaintiff, therefore, was entitled
(226) to recover for the additional injury to her property so far as it was caused by the defendants.

We now reach the question whether the defendants were liable for any part of the damages caused by the effect of the steel viaduct while it was in process of construction.

That structure was not erected by the defendants but by the state, as appears from the facts already stated. South of 125th street it gave them no facilities which they did not have before. The stone structure of 1872 did away with grade crossings and gave them four tracks, and this is all they have now. The change of grade north of 125th street, in order to cross the Harlem river at the height required by the general government, has no bearing upon the change of grade south of that point. The defendants are liable for what they did, but not for what the state did. (*Atwater* v. *Trustees, etc.*, 124 N. Y. 602.) The state created a board of experts and required them to make the improvement for the benefit of the public, giving them absolute control with no right on the part of the defendants to let or hinder. The board made the plans and did the work, letting their own contracts, employing and discharging their own men, without supervision or interference by the companies, which did not and could not set the board in motion, for the want of power, if for no other reason. The change of grade in front of the plaintiff's premises was not only for a public purpose, but was wholly in the interest of the public and not for the benefit of the defendants who had no power to prevent it. They simply paid one-half of the expense by command of the statute, and, hence, under compulsion of law. They are not liable for the acts of the Park avenue board, which was not their agent, but a governmental agency of the state. (*Benner* v. *Atlantic Dredging Co.*, 134 N. Y., 156, and cases cited on page 162.) Their offer in advance to obey the statute did not affect its compulsive force, for obedience was their duty. As was tersely said in a late case, the railroad company "had no choice left to it. The state intervened and directed that a work, which it had the power to require to be done, should be done, not by
(227) the railroad nor even by the city, but by an independent board in the creation of which the defendant

had no voice, over whose selection of employees it had no control, with the discharge of whose functions it could not interfere and whose operations it was powerless to prevent." (*N. Y., N. H. & H. R.R.* v. *Baker*, 98 Fed. Rep. 694.)

When the work was completed, if the defendants had not used it, they clearly would have been under no liability to the plaintiff. This is a decisive test, not only as to the permanent structure, but also as to the temporary trestles, which were part of the same scheme of the legislature, acting under general power, as well as that reserved when it incorporated the Harlem Company. They were erected by the same board, in the same way and under the same authority, but for the double purpose of aiding in the principal work of the state, and at the same time affording temporary relief to the defendants in the operation of their trains. The statute "authorized and directed" the defendants to operate their trains on the structures "when completed." Accordingly, they laid their tracks, at first on the trestle work, which they used for a short time, and then on the steel viaduct, which they have used ever since. In thus using the work of the state they doubtless accepted it as their own, but they accepted it as a completed structure, and did not thereby become parties to the process of construction. Their acceptance did not reach back and adopt the previous acts of the state, but the effect was the same as if they had purchased it from the state on the day they commenced to use it.

Thus we strike the time when the liability of the defendants began. When they commenced to use the steel viaduct they started a new trespass on the rights of the abutting owners. While they had a prescriptive right to use a railroad structure standing in the same place and of the same height as the stone viaduct, which was about 7 feet, they had no right, as against the plaintiff, to use the steel viaduct, which reached upward 35 feet until it was on a level with the windows of her fourth story. The new structure, so far as it stood within the
(228) lines of the old, was not a trespass, for it lessened instead of adding to the burden, but so far as it extended above the space which it had to occupy, it was a trespass, for which the defendants have properly been held liable during the time they used it. The trestle work, which stood wholly without the lines of the stone viaduct, was a trespass without mitigation, for it substantially closed the avenue and conferred no benefit whatever upon the adjacent property. As to that structure, the liability of the defendants was absolute during the period of user.

The permanent structure, however, was not an unmitigated trespass, for upon the surface of the street it was a great improvement upon the stone viaduct, which it displaced.

Before the change was made Park avenue was virtually two streets, each 42 feet wide, separated by a solid and impassable embankment 56 feet in width. Now it is 140 feet wide, with no obstruction to traffic except the columns which support the elevated roadbed. Never before could the plaintiff, or her predecessors, cross the street in front of her property, or even cross by the nearest lateral streets. For the first time in the history of the avenue its central portion is open, paved and capable of being used as a street. A substantial benefit was thus conferred, which, in assessing the damages inflicted upon the owner's easements, when no part of his land is taken, should in justice and according to authority be regarded. The basis of assessment is the difference in value of the easements as they now are and as they were with the old, and before the new viaduct was erected. (*Newman* v. *M. E. Ry. Co.*, 118 N. Y. 618, 624; *Bohn* v. *M. E. Ry. Co.*, 129 N. Y. 576, 591; *Sutro* v. *M. Ry. Co.*, 137 N. Y. 593; *Bischoff* v. *N. Y. El. R.R. Co.*, 138 N. Y. 257.) The courts below followed this rule and held the defendants liable for the net difference only.

The claim that the defendants abandoned their prescriptive rights by removing the old structure cannot be sustained. The old structure was not removed by the defendants, but by the state, of its own motion and through an independent
(229) agency created by itself. Moreover, the removal of one railroad structure, followed immediately by the erection of another, in the same place and for the same purpose, is no evidence of an intent to abandon the prescriptive right to have a railroad structure in the street. If the new structure had not been a greater burden than the old the plaintiff would have been entitled to no relief whatever.

The effect of the condemnation proceedings of 1850, which widened the avenue, created no new easements for the benefit of the plaintiff or her predecessors, so far as the original width of the avenue was concerned. This was passed upon in the *Conabeer Case* (*supra*), and requires no discussion.

We have reached the conclusion that the learned trial judge awarded and withheld relief precisely as the law requires, and that his judgment should stand. In reaching this conclusion we have been materially aided by the opinions delivered in the Supreme Court in this and other cases affecting the locality in question, although we have not adopted all of the grounds upon which that learned court proceeded to judgment. (*Taylor* v. *N. Y. & H. R.R. Co.*, 27 App. Div. 190; *Welde* v. *N. Y. & H. R.R. Co.*, 28 App. Div. 379, and 29 Misc. Rep. 13; *Birrell* v. *N. Y. & H. R.R. Co.*, 41 App. Div. 506; *Sander* v. *N. Y. & H. R.R. Co.*, 42 App. Div. 618.)

We have decided the case before us and have not tried to

decide other cases, which, although arising in the same section, rest upon different facts, and may be controlled by different principles of law. While we have carefully read the argument presented by learned counsel in behalf of the intervenors, we have limited its effect, so far as we have followed it, to the facts of this case.

The judgment should be affirmed, but as both parties appealed, without costs to either as against the other.

Parker, *Ch. J.*, Bartlett, Martin, Cullen and Werner, *JJ.*, concur; Gray, *J.*, not sitting.

Judgment affirmed.

Court of Appeals.

CHARLES WELDE, Respondent
vs.
THE NEW YORK AND HARLEM RAILROAD COMPANY, *et al.*, Appellants, Impleaded with Others.

168 N. Y., 597.

Argued April, 1901; decided October, 1901.

O'BRIEN, *J.:*

(598) The plaintiff is the owner of real property abutting upon Park avenue in front of the railroad operated by the defendants. The Harlem railroad was incorporated in the year 1831, but not constructed until the year 1837. Since that time various changes have been made in its roadbed and structure as well as in the street through which it passes. The questions involved in this appeal are to be determined by the findings of the court which appear in the record and which do not appear to be assailed by either party. The case is presented to us upon these findings, and the only question that we are now concerned with is the proper legal conclusion to be drawn from the facts so found.

What is now Park avenue was laid out on a map as early as the year 1807 to the width of one hundred feet. Subsequently, under a statute passed in 1837, this map was amended and the street as thus laid out was widened so as to constitute an avenue one hundred and forty feet in width; but the street was not actually opened and laid out as such until after the year 1850. It was then opened to the public as a street and subjected to the control of the municipal authorities, and has ever since remained a public street one hundred and forty feet in width, at least from Thirty-fourth street to the Harlem river. The defendants' railroad is constructed and operated in this street, and has been for over sixty years. In January, 1832, one Isaac Adriance, the plaintiff's remote grantor, then

owned the land described in the complaint and the land comprising what is now the bed of Park avenue or the street in question. At that time he executed and delivered to the Har-
(599) lem Railroad Company a deed of a strip of land twenty-four feet in width in the center line of this avenue from the southerly side of One Hundred and Twenty fourth street to One Hundred and Twenty-seventh street, "together with the power of sloping their embankments or excavations so much farther beyond the lines of said premises hereinbefore granted as may be necessary to support their works, not, however, extending beyond the width of the avenue." As the avenue was then one hundred feet wide, that was the utmost extent of the grant to the railroad, and it is conceded that whatever rights the defendants acquired under this grant may be asserted against the plaintiff, who has succeeded to the title of Adriance and is bound by any consent or conveyance by him for railroad purposes. It will be seen by the terms of this grant that the railroad was authorized, when necessary, to support the work, to place an embankment in the street to the width of one hundred feet at the bottom in order to procure a proper slope. It is also apparent that wherever it was necessary to make rock cuts or excavations through high ground, that the railroad was authorized to make excavations one hundred feet in width at the surface of the ground, or at least if that was necessary in order to give the proper slope to the excavation. The question arises as to the proper construction of this conveyance. It is obvious that the railroad and not the grantor was to be the proper judge to determine where excavations and embankments were necessary and the proper width and slope of the same within the limits of the one hundred feet. Whether the reasonable and practicable construction of this grant is that the railroad acquired thereby the consent of the property owner to the construction and maintenance of a railroad in the street as then laid out to the width of one hundred feet, or is limited to less than that by other considerations, is a question that would appear to be involved in the case, but may not be necessary to decide in view of the condition of the present record.

This action was commenced on the tenth day of October,
(600) 1895, and at that time, or at the time of the trial, the defendants' railroad was operated in Park avenue upon a steel viaduct structure eighty-two feet wide. It is a structure for four railroad tracks, supported upon five rows of columns, the outer rows of columns being placed substantially along the curb line of the avenue. Longitudinal plate girders were erected over the supporting columns so that the structure, or more properly speaking the columns, were about twelve feet and ten inches distant from the plaintiff's house line. The

main structure is entirely within the limits of the street as originally laid out to the width of one hundred feet, but as the girders extend beyond the main structure and are supported by columns at the curb line of the street, these columns or some of them are beyond the original street lines, but within the lines of the street as subsequently widened to one hundred and forty feet. Prior to the time that this structure was erected the railroad was operated in a rock cut at this point about sixty-two feet in width. The present structure was erected by a commission appointed by an act of the legislature, for the purpose of improving the street and enabling the public to use it to the full width by elevating the railroad structure at a proper height from the surface of the street. The statute which authorized this change in the operation of the railroad is chapter 339 of the Laws of 1892. It appears from the findings that this change was expressly directed by the statute and was the act of the state itself through this commission, the railroad company simply paying a portion of the expense in the form of an assessment. This was the situation, as disclosed by the findings, at the time of the commencement of this action. And an examination of the complaint shows that the action was commenced upon the theory that all these changes were made by the railroad company itself, whereas the trial court fonnd that they were made by the commission under the statute, and that the railroad company could not be subjected to any liability in consequence of anything done by this commission. By chapter 594 of the Laws of 1896, the act of 1892, above referred to, was amended, and the defendants were required to erect and maintain a station at One Hundred and Twenty-fifth street upon a modified structure, the plans for which are particularly specified in the statute. The act directed the railroad to reduce the width
(601) of the main structure to eighty-two feet, as it now is. The structure erected by the commission was much wider. The reason for thus directing the structure to be narrowed was, doubtless, to furnish proper egress and ingress from the station to the trains. Whatever the purpose was, the railroad complied with the mandate of the statute and made the changes precisely in the manner therein specified, and this is the only act which, according to the findings, is to be attributed to the defendants. Since February 16th, 1897, the defendants' trains have been operated on this four-track viaduct structure, as they now are, and so far as appears that was the earliest date of the use of this structure by the defendants. The findings of the court, as they appear in the present record, naturally suggest the following questions:

(1) Did the Adriance deed, before referred to, operate as a consent by the plaintiff's predecessor in title to the mainte-

nance and operation of the railroad in front of his premises in this street covering a space not to exceed one hundred feet wide?

(2) Does the present viaduct structure, so far as it occupies this one hundred feet space, constitute any trespass or invasion of the plaintiff's property rights, and, if so, to what extent? (*Conabeer* v. *N. Y. C. & H. R. R. R. Co.*, 156 N. Y. 474.)

(3) In view of the grant from the plaintiff's predecessor in title, already referred to, and the acts of the legislature above mentioned, is this viaduct structure, upon which the railroad is operated, rightfully and lawfully in the street?

(4) This structure having been erected under the authority of the state itself, in a public street, in order to improve the street for public travel, can the plaintiff maintain an action to enjoin the operation of the railroad, or to recover damages against the defendants, in consequence of the existence of the structure, or its use by the defendants?

(5) The structure, including the changes made subsequent to the year 1896, having been erected in pursuance of the command of the legislature and in precise conformity with the plans and specifications indicated in the statute, has the plaintiff any right of action against the defendants to enjoin the operation of the railroad, or to recover damages, in so far as the structure exists within the original limits of the street, that is to say, within the one hundred feet? (*Hill* v. *Mayor, etc., of N. Y.*, 139 N. Y. 495; *Bohen* v. *Port Jervis Gas*
(602) *Light Co.*, 122 N. Y. 18: *Cogswell* v. *N. Y., N. H. & H. R.R. Co.*, 103 N. Y. 10; *Morton* v. *Mayor, etc., of N. Y.*, 140 N. Y. 212; *D., L. & W. R. R. Co.* v. *City of Buffalo*, 158 N. Y. 266, 478; *Hill* v. *Managers of Met. Asylum District*, L. R. [4 Q. B. Div.] 433; *S. C.* on appeal, 6 App. Cas. 193; *Trauman* v. *London, Brighton & S. C. R'way Co.*, L. R. [25 C. H. Div.] 423.

As we are of opinion that there must be a new trial of the case for the reasons which will be presently stated, and as it is possible that the findings may be changed, we do not deem it necessary nor timely to discuss these questions. The facts as they now appear in the record and in the findings of the trial court may possibly be modified hereafter, and, therefore, we leave these questions for consideration when they are necessary to a decision of the case. While the trial court found that this structure was erected by the commission in pursuance of the statute, it did not find expressly whether it was a lawful structure or not, or whether its construction or the operation of the railroad upon it was an invasion of any of the plaintiff's property rights. It is true that since it awarded rental and permanent damages to the plaintiff it might be that the learned trial court was of opinion that the

structure, or at least some part of it, was an invasion of the plaintiff's rights of property. The learned trial judge decided in substance that the railroad was entitled to occupy the street for railroad purposes to the width of sixty-one feet and eight inches, and this proposition seems to have been based on the fact that that was the width of the rock cut in which the train was operated prior to the changes herein indicated. It was not decided whether the defendant was entitled to the use of the street beyond these limits under the grant from the original owner. It may be inferred from the result of the decision that the learned trial judge was of the opinion that the present structure, in so far as it extends beyond the width of the original rock cut, is an unlawful structure and an encroachment upon the plaintiff's rights, although that is not expressly stated in the decision. The learned trial judge, however,

(603) found that from April, 1893, to the time of the trial, the plaintiff's premises had produced an income less by seventy-two hundred dollars than they would have produced if the improvements and changes in Park avenue and in the defendant's railroad structure, as required by chapter 339 of the Laws of 1892 and the amending acts, had not been made; that this loss of income had not been uniform, but had been greater during the years 1894, 1895 and 1896, when the work of erecting that part of the structure which was to be devoted to the station was done, and when the original structure was in part taken down and the modified structure erected and the second station finished and completed. Now all this work, except that of narrowing the structure under the act of 1896, was done, not by the defendants, but by the state through the commission already mentioned, and as we have seen the learned trial judge held that the defendants were not liable for any damage resulting from the action of that commission in erecting the structure. All that the defendants did was to narrow the structure and build a station in the street under the express direction of the legislature contained in the act of 1896. But it is quite apparent that since the learned trial judge awarded to the plaintiff just seventy-two hundred dollars as rental damages, he must have held the defendants liable for the act of the commission in changing the street and erecting the viaduct structure. Very few, if any, of the injurious acts alleged in the complaint have been found by the learned trial court, and such acts of the defendants, as appear in the findings, commanded and contained in the law of 1896, in the modification of the structure by diminishing its width, all occurred subsequent to the commencement of the action. But it may be that the course of the trial justified the court in finding the facts as they existed at the date of the trial, although all these

facts so far as they attributed any interference by the defendants with the plaintiff's light, air and access, occurred subsequent to the commencement of the action.

We think that the judgment must be reversed and a new trial ordered, with costs to abide the event.

PARKER, *Ch. J.*, MARTIN and LANDON, *JJ.*, concur; BARTLETT, VANN and CULLEN, *JJ.*, concur in result.

Judgment reversed, etc.

Court of Appeals.

GUSTAV R. FRIES, Respondent,
v.
THE NEW YORK AND HARLEM RAILROAD COMPANY, *et al.*, Appellants.

169 N. Y., 270.

Argued April, 1901; decided December, 1901.

O'BRIEN, *J.*:

The plaintiff is the owner of a three-story frame (273) building on Park avenue, at the southwest corner of 129th street, in the city of New York. The building contains eight stores fronting on the avenue. This avenue is one hundred and forty feet wide, and the defendants own and maintain a railroad therein, and have under some form and under some arrangement for over sixty years. The plaintiff claims that the railroad has invaded his property rights and is a trespasser upon them. For this trespass the trial court held that the defendants should pay to the plaintiff the sum of five thousand five hundred dollars, past and future damages, or, in default of such payment, be perpetually enjoined from operating the railroad. This appeal involves an inquiry into the principles upon which the judgment is founded. There is considerable discussion upon the briefs of counsel who have argued the case concerning the effect of a deed to the railroad by the former owner of the plaintiff's property and many other details relating to the right of the railroad to construct and maintain the same in the street in front of the premises in question.

I cannot perceive how these questions can be of (274) much consequence in the disposition of this appeal, since the trial court made an express finding that under this deed various resolutions and acts of the city authorities at various times and under certain statutes referred to, and by lapse of time and the acquiescence of the plaintiff and his predecessors in title, the defendants "acquired the right without liability to the plaintiff to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16th, 1897, as hereinbefore described." Here we have an express finding that on and prior to the date named

the defendants were entitled to have and maintain their railroad in the street in question as against the plaintiff and all the world, without let or hindrance from any one, and surely there could be no trespass upon the plaintiff's rights prior to that date. The trial court also found how the railroad had been maintained and operated on and prior to the date mentioned, as follows: "The said railroad prior to February 16th, 1897, was operated along the center of said Park Avenue in front of the plaintiff's premises in a depressed cut about fourteen feet below the surface of said Park Avenue and sixty-one feet and eight inches wide, which said railroad cut was bounded on each side by parapet walls of about two feet six inches above the surface of said avenue, which said embankment or viaduct cut off access from one side of said avenue to the other, except at the intersection of 128th and 129th street, at which points there were bridges for vehicles and foot passengers across the said railroad cut." According to this finding the defendants had the right to maintain a railroad in front of the plaintiff's premises that practically cut him off from access to the opposite side of the street except by means of bridges located at intersecting streets. The court also found that subsequent to the date mentioned the manner of operating the railroad was changed, and this is the finding on that subject: "That subsequent to the passage of Chapter 339 of the Laws of 1892, there was commenced within the lines of Park Avenue and in the center thereof the construction of a new viaduct of iron and steel, said structure being about twenty feet high above the surface of Park Avenue and about fifty-nine feet wide. Said work was done under the supervision of the Board
(275) for Park Avenue improvement above 106th street, and the said structure was completed and accepted by the defendants on February 16th, 1897. That neither of the defendants are liable for any fee or rental damage which may have been sustained prior to that date; that said permanent structure and the operation of trains thereon are, and since February 16th, 1897, have been a continuous trespass upon plaintiff's easement of light and air appurtenant to his said premises, and solely in consequence of said trespass and aside from any other causes the rental value of said premises was depreciated from said date down to April 2d, 1900, the date of trial, in the sum of $1,500."

It will be seen that the trial court held that the present viaduct and the operation of trains thereon, are, and since the date mentioned, have been, a continuous trespass upon plaintiff's easements of light and air appurtenant to his premises. It also found that this structure was built and the trains operated thereon under and in pursuance of the provisions of chapter 339 of the Laws of 1892. An examination of that

statute discloses very clearly a comprehensive scheme on the part of the state for the improvement of Park avenue as a public street by removing the railroad tracks from the cut, closing up the cut and then regulating, grading and paving the street. It was a legislative scheme for the accomplishment of a public improvement. The railroad company had nothing to do with it except to pay such assessment as was imposed upon it by the public authorities to defray the expense of the improvement. Whatever changes were made in the street and in the operation of the railroad were made not by the defendant but by the state in virtue of its general power to improve and regulate public streets. The defendant could not resist the improvement if it would, nor could it refuse when the viaduct was constructed to operate its trains upon it, even if it wanted to, without subjecting itself to a sentence of death at the hands of the state, as all corporations do that refuse to discharge the duties or perform the functions for which they have been created. There is no finding and no claim that the removal of the tracks from the depressed cut to the elevated viaduct was the act of the
(276) defendant. On reading the statute it will be seen that it was an act of the state, and how the defendant in one day became a trespasser upon the plaintiff's property rights it is very difficult to conceive. Another case growing out of this improvement was recently before this court (*Welde* v. *N. Y. & Harlem R. R. Co.*, 168 N. Y. 597), in which the effect of this statute was pointed out. If the viaduct was lawfully constructed and existed in the street under the authority of law, it is impossible to conceive how the defendant could be guilty of a trespass in the operation of its trains upon it. It was constructed for that purpose and the defendant was obliged to use it in the exercise of its franchise and the discharge of the duties due to the public.

The state resolved to displace the railroad in the depressed cut in order to fill up the cut, regulate, pave and grade the whole street, and to this end commanded the railroad to run its cars upon tracks placed upon a viaduct constructed by the state under the statute, and the railroad obeyed. If in doing so it became a trespasser, it must be because the legislation providing for the change violated some property right of the plaintiff which is protected by the Constitution. In other words, it must be because the statute under which the change was made is unconstitutional. I am unable to perceive any reason why the legislature had not the power to improve the avenue by removing the railroad from the cut to a viaduct, and if the change affected the rental or fee value of the property of an abutting owner having no title to the street, it was

but a consequence of the improvement for which the railroad was not responsible. The law is well settled in this state that where the property of an abutting owner is damaged, or even his easement interfered with in consequence of the work of an improvement in a public street conducted under a lawful authority, he is without remedy or redress, even though no provision for compensation is made in the statute. Whatever detriment the improvement may be to the abutter in such cases, it is held to be *damnum absque injuria*. (*Radcliff's Executors* v. *Mayor, etc., of Brooklyn*, (277) 4 N. Y. 195; *Talbot* v. *N. Y. & H. R. R. Co.*, 151 id. 155; *Folmsbee* v. *City of Amsterdam*, 142 id 118; *Rauenstein* v. *N. Y., L. & W. Ry. Co.*, 136 id. 528; *Atwater* v. *Trustees, Vil., Canandaigua*, 124 id. 602; *Benner* v. *Atlantic Dredging Co.*, 134 id. 156.)

The change from the manner of operating the railroad in the depressed cut to an elevated viaduct was made in precise conformity to the mandate of an express statute, and hence even if the railroad made the change itself instead of the state, it would not be liable to the plaintiff. (*Hill* v. *Mayor, etc., of N. Y.*, 139 N. Y. 495; *Bohan* v. *Port Jervis G. L. Co.*, 122 N. Y. 18; *Cogswell* v. *N. Y., N. H. & H. R. R. Co.*, 103 id. 10; *Morton* v. *Mayor, etc., of N. Y.*, 140 id. 212; *D., L. & W. R. R. Co.* v. *City of Buffalo*, 158 id. 266; Id. 478; *Hill* v. *Managers of Met. Asylum Dis.*, L. R. [4 Q. B. Div.] 433; *S. C.* on appeal, 6 App. Cas. 193; *Truman* v. *London, B. & S. C. R'way Co.*, L. R. [25 Ch. Div.] 423.) The railroad originally covered nearly 62 feet of the street surface. Now the elevated structure covers only 59 feet above the surface. It would seem to be impossible to sustain the judgment in this case without assailing the constitutional validity of the statute under which this change was made, but I think it would be difficult, in view of the authorities cited, to state any ground upon which it can be questioned. But if this were otherwise it is clear that the plaintiff upon the present record is in no condition to raise any such question. He has not raised it in any form in any court, and it cannot be raised for him now as this court has recently held. (*Dodge* v. *Cornelius*, 168 N. Y. 242.) The plaintiff has not only refused to raise any question concerning the validity of the statute in this or any other court, but has actually affirmed its validity by setting it out in his complaint and basing his action upon it. So we have the case of a change in the grade of a street which necessitated a change in the location of the railroad tracks, all made under a valid statute, and that (278) alone is said to constitute the alleged trespass. The plaintiff's claim would seem to be answered by the principle laid down in the *Rauenstein* case, the other

cases first cited, and in *Ottenot* v. *N. Y., L. & W. Ry. Co.* (119 N. Y. 603.) The judgment in this case rests upon what may be called, for want of a better expression, a legal paradox. All that was done that in any way affects the plaintiff's property rights was done, not by the defendant, but by the state. The state engaged in the municipal duty of improving a street in which there was the right to maintain a railroad. It constructed a viaduct in order that the railroad might be operated upon it, and the railroad obeyed. This court has held that the railroad could not resist, which means, of course, that the legislation was valid. (*Lewis* v. *N. Y. & H. R. R. Co.*, 162 N. Y. 226.) On the 15th of February 1897, it is found that the defendant was rightfully and lawfully operating its railroad in this public street. The next day, as has been decided, it became a trespasser, not only in running trains upon the viaduct, but by maintaining it in the street. It would seem to follow from this that while the state had power to do everything that was done and to compel the railroad to be operated upon the viaduct, yet the railroad was guilty of a trespass in doing so; that is to say, the state compelled the railroad to commit a trespass and the railroad must be held liable for everything done by the state in the exercise of its supreme authority. The conclusion of the learned trial judge seems to me to involve this method of reasoning, and it would seem that a result which in its last analysis depends upon such arguments must necessarily be unsound.

The elevated railroad cases in this court proceed upon the principle that, as against abutting owners, the railroad was unlawfully in the street, as they had not consented to the construction or conveyed the right to interfere with their easements. But in the case at bar we have an express finding that the defendant had acquired the right as against the plaintiff to use the street for the operation of the railroad. Hence,

(279) the principles upon which that mass of litigation proceeded have no application to this case, and so this court has held. (*Conabeer* v. *N. Y. C. & H. R. R. R. Co.*, 156 N. Y. 474.)

On reading the opinions in the court below, both at the trial and on appeal, it will be seen that no reason has been given for the judgment, except that it was supposed to be required by something decided by this court in *Lewis* v. *N. Y. & H. R. R. Co.* (162 N. Y., 202). I do not think that anything was presented, discussed or decided in that case that warrants the judgment in the case at bar. In the first case, the learned judge who gave the opinion in that case was careful to say at its conclusion: "We have decided the case before us, and have not tried to decide other cases, which, although arising in the same section, rest upon different facts and may be con-

trolled by different principles of law." This case does rest upon different facts, comes here in a very different way and is governed by different legal principles, and so is within the saving clause of the opinion. (1) In the first place the legal questions here mentioned were not presented, argued or discussed at all in that case. (2) In that case both parties appealed from a small judgment, and, hence, neither party was bound by the findings, except so far as there was evidence to support them. The evidence in support of the findings was, therefore, open for discussion here, and it will be seen from the report of the case that the discussion proceeded not so much upon the facts found as upon the proofs given, the decision below not being unanimous. The question of title in the railroad and of adverse possession were the principal matters discussed. Here we are relieved from all discussion of the evidence, since we have specific findings that the plaintiff does not question by appeal or otherwise, and that conclude the defendant as to the facts, and so we have a situation entirely different. (3) It was not found in that case that the railroad was lawfully in the street on the day that the present viaduct was completed, but only that it was lawfully in the street at an earlier date by three years. In the meantime it seems that it was shown in that case that the railroad was using an old viaduct constructed of stone, so far (280) as it appears upon its own authority, while in this case no disturbing element of that kind intervenes, and hence we have to deal only with the single question whether the defendant was guilty of a trespass in the use of a viaduct constructed for that purpose by the State under a statute, and which the defendant was obliged to use, whether it would or not. These considerations mark a material distinction between the *Lewis* case and the one at bar. This case is not embarrassed by any such elements as existed in the case referred to. I have quoted the findings upon which this case comes here, and so long as these findings stand in the case, I am unable to see how there can be any recovery.

There are two other questions in the case of minor importance, but which merit a brief notice. The plaintiff became the owner of the premises in question in November, 1891. The second floor of the block was devoted to a dancing hall and the third or top floor to lodging rooms. In 1893 the plaintiff leased the dancing hall to a tenant with the use of the lodging rooms for a long term of years, and in 1896 he leased to the same tenant the corner store and basement. This tenant was in possession, paying the stipulated rent for the premises at the time of the commencement of this action. It will be seen by the findings of the court that the plaintiff

was allowed for the diminution in the rental value from February 16th, 1897. The damage to the rental value, if any, therefore, belonged to the tenant and not to the landlord as to that part of the property which was leased. The plaintiff, who was the landlord, lost nothing by the depreciation, because his rental was fixed long before the trespass began. It is only in those cases where the leasing takes place after the trespass or interference with the easements that the landlord is permitted to recover (*Kernochan* v. *N. Y. El. R. R. Co.*, 128 N. Y., 559; *Hine* v. *N. Y. El. R. R. Co.*, id., 571; *Kearney* v. *Met. El. Ry. Co.*, 129 id., 76; *Witmark* v. *N. Y. El. R. R. Co.*, 149 id., 393).

(281) It must be apparent that at least with respect to the plaintiff's easement of access, it must have been greatly improved by the removal of the railroad from the cut and the grading and paving of the street below the elevated structure. How the change interfered with his easements of light and air it is difficult to conjecture. But assuming that the findings of the court below in that respect are supported by some evidence, it is important to notice the line of proof given as to depreciation in rental and fee value. It appears from the record that the plaintiff called an expert who testified to the course of values in real estate on Madison and Lexington avenues, and was asked if there was anything which should induce the upward tendency in value in these avenues since 1892, which would have obtained in Park avenue had there been no change in the railroad. The questions in regard to the course of values on both these streets were objected to as incompetent. The objection was overruled and the defendants' counsel excepted. It will be seen that the witness was required to institute a comparison between property on Park avenue and on these other avenues for the purpose of proving damages. Park avenue was concededly subject to a servitude as of right for the use and operation of the railroad. Whatever effect that use or operation had upon the abutting property, the defendants cannot be made liable therefor. The other two avenues mentioned were not subject to any such servitude, and it was, I think, improper to give proof under which the court was required to institute a comparison of values between property on these two avenues which were situated so differently from that upon the avenue where the railroad was rightfully constructed and operated. It may be that in the elevated railroad cases proof of this character was admissible for the reason, as has already been pointed out, that in those cases there was no servitude upon the street as against the abutting owner. If, in the case at bar, the defendant had no right to be in the street as against the abutter, then

it may be that the proof would be admissible, but to compare the value of property on two avenues where there was no right to have or maintain a railroad, with property on
(282) another avenue where there was such a right, was improper and misleading.

The judgment should be reversed and a new trial granted, costs to abide the event.

MARTIN, J.:

Although there is a divergence of opinion among the members of the court as to some of the legal questions involved in this case, yet all agree that the statute (L. 1892, ch. 339) under which the acts complained of were performed is valid, and that the legislature did not transcend its powers in enacting it. It must also be admitted that all the acts of the defendants for which the plaintiff claims they are liable were performed under and in compliance with the direct and express mandate of that statute. That there was no encroachment upon or actual interference with the plaintiff's premises, and that the improvement was made for the benefit of the public and in a proper manner, are likewise practically conceded. Hence, the broad question presented is whether, in the absence of any statute providing for compensation, the defendants are liable for remote or consequential damages in having performed only such acts as were required by the express provisions of the statute upon works of a public nature, where there was neither negligence nor want of skill and no direct invasion of any private property of the plaintiff. We think not. In every civilized community controlled by governmental or municipal laws or regulations, there are many cases where the individual must be subjected to remote or consequential damages or loss to which he must submit without other compensation than the benefit he derives from the social compact. It is well settled by many decisions of this court that acts which are authorized by an express enactment of the legislature and performed in good faith upon a work of a public character, do not render the persons performing them liable for consequential damages unless there is an absence of due care or skill in the execution of the work. In other words, an act done under express authority of law for a public purpose, if done in a proper manner, and the property of the individual is not taken or encroached upon, will not subject the party doing it to an action for its consequences whatever they may be,
(283) unless the law itself provides compensation for injuries of that character. This is the rule where public works for the general welfare are constructed or operated.

Moreover, it seems to us that the principles of law relating to the change of the grade of streets, when lawfully made, are

applicable in this case. Here the defendants possessed the right to maintain their railroad and run their trains along and over the street. With their rights, as they then existed, they were content. The sovereign power of the state, however, interfered for a public purpose by a law which expressly and specifically required the grade upon which the railroad was run on this street to be changed, and caused to be erected a steel viaduct upon which the defendants were required to run their trains, so that every act of the defendants of which the plaintiff complains was required by express provision of law. Under these circumstances, it seems quite clear to us that the defendants, as they have not encroached upon the land of the plaintiff or in any way interfered with it, are not liable for any consequential damages the plaintiff may have sustained by reason of the defendants having obeyed the mandate of the statute. These views find support in the following authorities: *Lansing* v. *Smith* (8 Cow. 146); *Radcliff's Executors* v. *Mayor, etc., of Brooklyn* (4 N. Y. 195); *Wynehamer* v. *People* (13 id. 378, 401); *Davis* v. *Mayor, etc., of N. Y.* (14 id. 506, 522); *Bellinger* v. *N. Y. C. R.R.* (23 id. 42); *Selden* v. *D. & H. C. Co.* (29 id. 634, 642); *Coster* v. *The Mayor, etc., of Albany* (43 id. 399, 415); *Brooklyn Park Comrs.* v. *Armstrong* (45 id. 234, 245); *Kellinger* v. *42nd St. & G. S. F. R.R. Co.* (50 id. 206); *Losee* v. *Buchanan* (51 id. 476, 480); *St. Peter* v. *Denison* (58 id. 416); *Clemence* v. *City of Auburn* (66 id. 334, 339); *Moore* v. *City of Albany* (98 id. 396, 407); *Uline* v. *N. Y. C. & H. R. R.R. Co.* (101 id. 98, 107); (284) *Conklin* v. *N. Y., O. & W. Ry. Co.* (102 id. 107); *Cogswell* v. *N. Y., N. H. & H. R. R. Co.* (103 id. 10); *Heiser* v. *Mayor, etc., of N. Y.* (104 id. 68, 72); *Bohan* v. *P. J. G. L. Co.* (122 id. 18, 26); *Atwater* v. *Trustees Vil. of Canandaigua* (124 id. 602, 608); *Reining* v. *N. Y., L. & W. Ry. Co.* (128 id. 157); *Egerer* v. *N. Y. C. & H. R.R. Co.* (130 id. 108); *Benner* v. *A. D. Co.* (134 id. 156); *H. R. T. Co.* v. *W. T. & Ry. Co.* (135 id. 393, 411); *Rauenstein* v. *N. Y., L. & W. Ry. Co.* (136 id. 528); *Hill* v. *Mayor, etc., of N. Y.* (139 id. 495, 501); *Folmsbee* v. *City of Amsterdam* (142 id. 118, 122); *Talbot* v. *N. Y. & H. R.R. Co.* (151 id. 155); *Sullivan* v. *Dunham* (161 id. 290, 298); *Huffmire* v. *City of Brooklyn* (162 id. 584, 589); *Uppington* v. *City of N. Y.* (165 id. 222, 228).

While in some of the cases cited the question here is not involved or decided, still, even in those cases the rule suggested has been recognized and admitted to be the existing law of this state.

Aside from the case of *Lewis* v. *N. Y. & H. R.R. Co.* (162 N. Y. 202) the only authorities upon which reliance is placed, to sustain a contrary doctrine, are the elevated railroad cases.

While those cases have created a liability theretofore unknown, which we think should not be extended, still, it seems to us, they are not only clearly distinguishable from a case like this, but should be distinguished on the merits. In those cases, if correctly understood, the only authority the elevated railroad company had to appropriate the street was the consent of the legislature and the municipal authorities. There, there was no law prescribing what they should do or that required them to do it. Here, we have a valid statute which expressly and specifically provides what shall be done as to the change of the grade in this street or the erection of a viaduct, provides the manner in which it shall be done, and appoints, or provides for the appointment of, commissioners to carry the statute into effect. It then directs that upon the completion of such viaduct, the defendants shall run their trains over it. Thus in one case we have a mere consent or permission by the public authorities, while in the other we have an express and mandatory statute requiring the defendants to do precisely what they did, and of which the plaintiff now complains. It seems to us that this distinction requires us to apply the
(285) general principle applicable to such a case and not the special law that has been created by the decisions in the elevated railroad cases.

While I agree generally with the views expressed by Judge O'BRIEN, I still think that the decision about to be made can be said to be in conflict with the *Lewis* case, and to such extent as it is, the *Lewis* case should be regarded as limited.

CULLEN, *J.* (dissenting).

I dissent from the decision about to be made because I regard it as not only inconsistent with our recent decision in the case of *Lewis* against this defendant (162 N. Y. 202), but as opposed to the prevailing law of this state. Four propositions are settled law with us: 1. That the damage inflicted on an abutting owner by a change in the grade of a street does not constitute a taking of property within the meaning of the Constitution, and that the abutter is not entitled to compensation for such injury unless some statute awards it. (*Radcliff's Exrs.* v. *Mayor, etc., of Brooklyn*, 4 N. Y. 195; *Talbot* v. *N. Y. & Harlem R.R. Co.*, 151 id. 155.) 2. That the use of the surface of a street or highway for the purpose of a railroad does not invade any property right of an abutting owner who has no title to the soil of the street. (*Kellinger* v. *F. S. St. & G. S. F. R.R. Co.*, 50 N. Y. 206; *Forbes* v. *R. W. & O. R.R. Co.*, 121 id. 505.) 3. That an abutter has an easement in the street for the purposes of light, air and access; that the erection of an elevated structure for the purpose of carrying a railroad thereon is an invasion of such easement and an appro-

priation of the abutter's property rights, for which, under the Constitution, he must be compensated. (*Story* v. *N. Y. El. R.R. Co.*, 90 N. Y. 122. See all the elevated railroad cases since that decision.) 4. That while the public authorities may raise the grade of a street for street use, or may authorize the construction of a surface railroad on the street, in either case without liability to abutters, they cannot raise the
(286) grade of a street for the exclusive use of a railroad without compensating an abutter for the injury inflicted. (*Reining* v. *N. Y. L. & W. Ry. Co.*, 128 N. Y. 157.) The circumstances which distinguish a case which falls under one rule from one which falls under another rule are readily apprehended, and the rules are of comparatively easy application. Whether the difference in circumstance is such as to justify the distinction in principle which prevails in our state is quite another question. I admit that two rules of law, one of which declares that raising the grade of a street and the construction of a bank of solid filling opposite an abutter's premises is *damnum absque injuria*, and the other, which holds that the erection of an elevated railroad is an invasion of the property rights of an abutter which cannot be constitutionally effected without compensation, may seem somewhat inconsistent. But I intend not to be led into a discussion of that subject. It is sufficient to say that such is the settled law of the state, and that the rules which I have stated, consistent or not, exist in full force and integrity in our jurisprudence at this very time, and that on their authority we are deciding cases at almost every term of court. I may, however, remark in passing that if the attempt is to be made to harmonize the law on this subject, surely it should not be in the direction of extending the doctrine of *Radcliff's Exrs.* v. *Mayor, etc., of Brooklyn*. That case has been repudiated in many jurisdictions, and though firmly imbedded in the law of this state, the hardships occasioned by its application have been so great that in most cases legislative enactments have given abutters the right to compensation for their injuries. If while the legislature can authorize the laying of a surface railroad without compensation to the abutter, it cannot authorize the construction of a viaduct for an elevated railroad unless compensation be made to the abutter, it must be equally without power to transform a surface road into an elevated road without providing for such compensation. It necessarily follows that, notwithstanding the legislature might have authorized the grade of Fourth avenue to be raised to the height of the structure for the erection of which the plaintiff brings this action, without liability to abutters, that structure invades the plaintiff's property rights, an invasion for which he

is entitled to compensation. To relieve the defendant
(287) from liability for such compensation it must trace its right to maintain the viaduct as against the abutter, not to the act of the legislature alone, but to a grant of some private property easement to which the plaintiff's title is subordinate or to prescription, which is merely the presumption of such a grant.

It is said that the legislature had power to authorize the improvement of Fourth avenue and to direct the railroad company to elevate its tracks. This cannot be doubted. But it could not relieve either the commissioners or the railroad company from paying for any private property taken for the improvement. If I am right in the proposition repeatedly held by this court that an abutter has an easement of light, air and access in a street as against all structures therein except those to be used for strictly street purposes, and as against all improvements save a change in the grade of the street itself, then the situation in no way differs from that which would have been presented had the legislature turned the railroad company off the street altogether and made it construct a new line on adjoining property. In either case the railroad company would be bound to pay for what it took. These propositions were not discussed in the *Lewis* case, but were assumed as settled by the previous decisions of this court and that decision could not have stood on any other foundation. What here has been written, there passed without the saying. In the *Lewis* case the defendant was held not to be answerable in damages until it began running its trains over the structure. This ruling did not proceed on the theory that the construction of the viaduct worked no trespass on the plaintiff's rights, but on the ground that the defendant did not participate in that trespass until it went into possession of the structure and ran its trains thereon. There is no inconsistency between the *Lewis* case and that of *Conabeer* against this defendant (156 N. Y., 474). The same learned judge that wrote in the earlier case concurred in the opinion delivered in the later case. In the *Conabeer* case the trial court found as a matter of
(288) fact that no injury to the plaintiff's easement was occasioned by the new structure. In the *Lewis* case and in the present one the findings of fact are the exact reverse.

It is said that the trial court has found the structure to be lawful and that such finding is binding upon us. The finding is merely one of law and properly construed it is correct. An obstruction in a highway that would otherwise constitute a nuisance may be authorized by the legislature; but, of course, the party creating it would have no right to maintain it as against the owner of the soil of the highway. Yet the main-

tenance of the obstruction would be properly characterized as lawful, that is to say, as having the authority of law and as not being a nuisance. It is further contended that for the plaintiff to succeed, the statute authorizing this improvement must be held unconstitutional and that as no question of its constitutionality was raised in the trial court none can be raised here. The statute is not unconstitutional and no decision to that effect is necessary to secure the plaintiff's rights. If an act were passed by the legislature authorizing a corporation to construct a bridge across the Hudson river above Waterford, it would be unconstitutional because the Constitution prohibits the enactment of a special law for such purpose. If, however, the act authorized the construction of a bridge at the Highlands (the Constitution permitting special acts for bridges over the Hudson river below Waterford) it would not be rendered unconstitutional by the fact that the company did not own a rood of ground in either of the counties which border on the river at that point. The statute would simply be inoperative until the company acquired the necessary land.

As this is a dissenting opinion, I do not deem it necessary to discuss the extent of the right acquired by the defendant through private grant. It is sufficient to say that it is not greater than that carefully examined and considered in the *Lewis* case, and that it is of the same general character. If my difference with the majority of the court related merely to that subject I should be content to confine myself
(289) to the record of my vote. It is against what I consider the broad and far-reaching doctrine of the prevailing opinion that I feel constrained to express the reasons for my dissent.

MARTIN, J., in memorandum concurs with O'BRIEN, J.; PARKER, Ch. J., and LANDON, J., concur with O'BRIEN and MARTIN, JJ.; BARTLETT and VANN, JJ., concur with CULLEN, J.

Judgment reversed, etc.

Court of Appeals.

HENRY MUHLKER, Respondent and Appellant,
v.
THE NEW YORK AND HARLEM RAILROAD COMPANY et al., Appellants and Respondents.
} 173 N. Y., 549.

Argued October, 1902; decided February, 1903.

PARKER, *Ch. J.:*

The facts in this case present the same question that was before this court in the *Lewis Case* (162 N. Y. 202)
(551) and the *Fries Case* (169 N. Y. 270) and that is, whether defendant is liable for any damages that may have

been sustained by plaintiff by reason of the interference with his easements of light, air and access by the erection of the viaduct upon which its trains are now being run.

Defendant was incorporated in 1831, and in 1832 it took from one Poillon a deed to a strip of land 24 feet wide in the center of what is now known as Fourth avenue, in the city of New York, along which the premises belonging to the plaintiff are situated. Subsequently double tracks were laid thereon and trains operated, and this continued until after 1872. In that year an act was passed (Ch. 702, Laws of 1872) under which the tracks were increased to four and were laid in a subway or cut bounded on both sides by masonry walls which rose to a height of three feet above the surface of the avenue. As soon as the work was completed the tracks were used for railroad purposes and so continued until the state compelled the road to abandon their use and to operate its cars upon the viaduct which was constructed by the state pursuant to ch. 339, Laws of 1892.

Without further reference to the history of the road in that avenue it may be said that prior to the time when the operation of its trains was transferred from the subway to the viaduct it had acquired the right as against the abutting owners to maintain its railroad and run its trains along and over Fourth avenue. (*Fries Case, supra.*)

In 1890 Congress passed an act directing the secretary of war to cause the bridges over the Harlem river to be replaced by other bridges which should be at least 24 feet above the high water of the spring tides. (U. S. Statutes at Large, vol. 26, p. 437.) As defendant's road crossed one of these bridges, compliance with the provisions of this act made necessary a change in the grade of defendant's railroads, and the act provided that such changes should be made as
(252) soon as the necessary legislation could be obtained to authorize a change in the grade of the approaches to the bridge.

About two years later the legislature passed the act already referred to by which it undertook to accomplish the result aimed at by Congress in such a manner as actually to improve the use of the street itself, a part of the scheme being to compel this defendant to operate its road upon a steel viaduct elevated above the ground, thus giving the public the use of the whole of the surface of the street which before was impossible.

This improvement was made by the state for the benefit of the public, the expense of it, by the mandate of the State, being borne by the city and this defendant in equal proportions. What was done by the state and the legal effect of its action upon the rights of this defendant cannot be better

stated than it was by Judge VANN in the *Lewis Case* (*supra*) and so I quote it:

"That structure was not erected by the defendants, but by the state, as appears from the facts already stated. South of 125th street it gave them no facilities which they did not have before. The stone structure of 1872 did away with grade crossings and gave them four tracks, and this is all they have now. The change of grade north of 125th street, in order to cross the Harlem river at the height required by the general government, has no bearing upon the change of grade south of that point. The defendants are liable for what they did but not for what the state did. (*Atwater* v. *Trustees of Vil. of Canandaigua*, 124 N. Y., 602.) The state created a board of experts and required them to make the improvement for the benefit of the public, giving them absolute control with no right on the part of the defendants to let or hinder. The board made the plans and did the work, letting their own contracts, employing and discharging their own men, without supervision or interference by the companies, which did not and could not set the board in motion, for the want (553) of power, if for no other reason. The change of grade in front of the plaintiff's premises was not only for a public purpose, but was wholly in the interest of the public and not for the benefit of the defendants who had no power to prevent it. They simply paid one-half of the expense by the command of the statute, and, hence, under compulsion of law. They are not liable for the acts of the Park avenue board, which was not their agent, but a governmental agency of the state. (*Benner* v. *Atlantic Dredging Co.*, 134 N. Y., 156, and cases cited on page 162.) Their offer in advance to obey the statute did not affect its compulsive force, for obedience was their duty. As was tersely said in the late case, the railroad company 'had no choice left to it. The state intervened and directed that a work, which it had the power to require to be done, should be done, not by the railroad nor even by the city, but by an independent board in the creation of which the defendant had no voice, over whose selection of employes it had no control, with the discharge of whose functions it could not interfere and whose operations it was powerless to prevent.' * * * The statute 'authorized and directed' the defendants to operate their trains on the structure 'when completed.' Accordingly they laid their tracks, at first on the trestle work, which they used for a short time, and then on the steel viaduct, which they have used ever since. In thus using the work of the state they doubtless accepted it as their own, but they accepted it as a completed structure, and did not thereby become parties to the process of construction. Their accept-

ance did not reach back and adopt the previous acts of the state, but the effect was the same as if they had purchased it from the state on the day they commenced to use it."

Although at the time of the decision of the *Lewis* case we accepted as sound the proposition that, when defendant commenced to use the steel viaduct, it started a new trespass upon the rights of the abutting owners for which it could properly be held liable, subsequent reflection persuaded the majority of the court that this was error. The reasoning which seemed to command the latter conclusion was,
(554) briefly, that the state, setting about making improvements in Fourth avenue which were to benefit the general public, found defendant in possession of four tracks in the middle of the avenue, with the right to operate its trains upon them, which it was enjoying. The state could not if it would—and probably would not if it could—deprive defendant of its right to operate its trains in the street. But it had the power in the public interest to compel it to run its trains upon a viaduct instead of in the subway. So the state builded the viaduct over the part of the street formerly occupied by the subway and compelled it to stop running its trains in the subway and to run them on the viaduct instead. The state had the power to do these things and all of them, and defendant, having the right to move its trains over the street, which could not be taken away from it, did not lose that right and become a trespasser because it obeyed the command of the statute, which it could not refuse to obey, to operate its trains upon the structure which the state had built.

The plaintiff was injured by the change, as appears from the findings. But who caused the injury? The defendant, which obeyed the command of the statute which it had not the right to resist, or the state, which had the power to make the changes which were made in the street and did make them and then compelled defendant to make use of them? The question admits of but one answer, and that is, it was the state.

When the question was again presented, therefore, as it was in the *Fries case* (*supra*), we attempted to cure the error which we concluded we had made in the *Lewis* case. The opinions in the *Fries* case were written by Judge O'BRIEN and Judge MARTIN. In the course of Judge O'BRIEN'S opinion it is said:

"I am unable to perceive any reason why the legislature had not the power to improve the avenue by removing the railroad from the cut to a viaduct, and if the change affected the rental or fee value of the property of an abutting owner having no title to the street, it was but a consequence of the

improvement, for which the railroad was not responsible. The law is well settled in this state that where the property of an abutting owner is damaged, or even his easements
(555) interfered with in consequence of the work of an improvement in a public street conducted under a lawful authority, he is without remedy or redress, even though no provision for compensation is made in the statute. Whatever detriment the improvement may be to the abutter in such cases is held to be *damnum absque injuria.*"

Judge MARTIN states the principle as follows: "It must also be admitted that all the acts of the defendants for which the plaintiff claims they are liable were performed under and in accordance with the direct and express mandate of that statute. That there was no encroachment upon or actual interference with the plaintiff's premises, and that the improvement was made for the benefit of the public, and in a proper manner, are likewise practically conceded. Hence, the broad question presented is whether, in the absence of any statute providing for compensation, the defendants are liable for remote or consequential damages in having performed only such acts as were required by the express provisions of the statute upon works of a public nature, where there was neither negligence nor want of skill, and no direct invasion of any private property of the plaintiff. We think not. In every civilized community controlled by governmental or municipal laws or regulations, there are many cases where the individual must be subjected to remote or consequential damage or loss, to which he must submit without other compensation than the benefit he derives from the social compact."

The judgment was accordingly reversed. That decision was deliberately and carefully made, and reflected the view of a majority of the members of this court at that time, and still does.

The dissenting opinion cited, and correctly, the *Reining Case* (128 N. Y. 157) as authority for the proposition that "while the public authorities may raise the grade
(556) of a street for a street use, or may authorize the construction of a surface railroad on the street, in either case without liability to the abutters, they cannot raise the grade of a street *for the exclusive use* of a railroad without compensating an abutter for the injury inflicted." But that proposition is not involved in this case. Here the state did not authorize a change in the street for the exclusive use of the railroad. The change was made for the public benefit as well as for that of the railroad, and for that reason the state compelled the city of New York to pay one-half of the expense of it.

The decisions in the elevated railroad cases are not in point.

There no attempt was made by the state to improve the street for the benefit of the public. Instead, it granted to a corporation the right to make an additional use of the street, in the doing of which it took certain easements belonging to abutting owners, which it was compelled to compensate them for.

It is again urged on this appeal that the act under which these changes were made is unconstitutional, and hence that defendant need not have obeyed its commands. But that question was considered and passed upon by this court in the *Fries* case, every member of the court, whether voting with the majority or minority, agreeing that the act was constitutional. Judge O'BRIEN said, in discussing the constitutional question: "I think it would be difficult, in view of the authorities cited, to state any ground upon which it can be questioned." And Judge MARTIN commenced his opinion by saying: "Although there is a divergence of opinion among the members of the court as to some of the legal questions involved in this case, yet all agree that the statute under which the acts complained of were performed was valid, and that the legislature did not transcend its powers in enacting it." And Judge CULLEN said: "The statute is not unconstitutional and no decision to that effect is necessary to secure plaintiff's rights."

We still think, under the authority of *Radcliff's Executors* v. *Mayor, etc., of Brooklyn* (4 N. Y. 195) and the other cases cited by Judge MARTIN in his opinion in the *Fries* case, that the state had the power to make this improvement, as
(557) it did, without compensation to the abutting owners. Undoubtedly the state had also the power to provide in the act for compensation to abutting owners, and to apportion the expense incurred in the acquisition of the easements destroyed upon the defendant and the city of New York, as it apportioned the expenses of building the viaduct and making the other changes in the street; and it still has the power to authorize ascertainment of the damages to the abutting owners through its Court of Claims and to provide for their payment, and it may well be that it would be equitable for it to do so. But that it possessed the power to improve the street, as it did, for the benefit of the public, in the manner that it did, compelling abutting owners to bear so much of the burden of the improvement as resulted from the partial destruction of their easements of air, light and access, we have no doubt. Indeed, if in the judgment of the legislature it had seemed wise and just to do so, it could have assessed a portion of the expense of the improvement upon the abutting owners instead of placing it all upon the defendant and the city.

The judgment should be reversed and the complaint dismissed, without costs.

BARTLETT, J. (dissenting).

This is one of a large number of cases brought against the defendant railroad companies to recover damages for the erection of the steel viaduct in Park avenue, extending from near 106th street to the Harlem river, and over which the defendants operate their railroad with some two hundred trains a day.

The plaintiff recovered three thousand dollars fee damages and fourteen hundred dollars rental damages from February 16th, 1897, to October 10th, 1900, which was the date of the trial. The former date, February 16th, 1897, is the day on which the defendant companies began running their trains. The judgment of the Appellate Division was entered on the 29th day of April, 1901.

The case of *Fries* against these defendants was not decided in this court until December 31st, 1901. (169 N. Y. 270.)

The plaintiff appealed from the judgment on the ground that he was limited in his recovery by an improper rule
(558) as to the measure of damages, the court holding that he was not entitled to recover damages prior to February 16th, 1897, the day the steel viaduct was completed.

The counsel for the defendants also appeals, contending that our decision in the *Fries* case is conclusive as to all questions presented in the case at bar, and nothing remains to be decided.

The counsel for the plaintiff attempts to distinguish these cases as follows: (1) That in the *Fries* case there was a finding that the defendants had "acquired the right, without liability to the plaintiff, to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16th, 1897," and in the case at bar there is no such finding; (2) that Fourth or Park avenue, in front of the premises in suit, was a public street prior to the defendants' entry into the same.

(The premises involved are situated at the northwesterly corner of Park avenue and 115th street, and the viaduct structure of iron and steel in front of these premises is about 59 feet wide, and consists of four tracks laid on a steel structure, having a mean elevation of about 31 feet above the surface of said avenue. Prior to the erection of this viaduct, the tracks in the subway were at the south line of the plaintiff's premises, about level with the surface of the avenue, and at the north line about five and one-half feet below it. This subway was completed and trains began to be operated in it in 1878); (3) that in the *Fries* case the act of 1892 was assumed to be constitutional, and in this case its constitutionality is controverted; (4) that the rule of *damnum absque injuria* has no application to this case.

The plaintiff contends that Fourth avenue was a public

street at the time the Harlem Railroad Company, which is the lessor of the Central and Hudson, was organized.

Twenty-four feet of Fourth avenue, as it was then called, in front of the premises in question, were conveyed to the city July 24th, 1827, by Poillon.

In January, 1832 (the Harlem Railroad Company having been incorporated in 1831), Poillon conveyed to the
(559) Harlem Railroad Company 24 feet in Fourth Avenue, but at that time he had nothing to convey; he also refers in that conveyance to, and sanctions the map of New York, filed by the commissioners in 1811 under the act of 1807.

So far as these premises are concerned, it would seem as if the only right the Harlem Railroad Company acquired in the street, if any, was a prescriptive one, that would be no broader than its actual occupation. (*Lewis Case*, 162 N. Y., 202.)

It is true that Poillon's deed to the city was never recorded, but this was not essential in order to create a highway. (*Driggs* vs. *Phillips*, 103 N. Y., 77). Furthermore, the Harlem Railroad Company could not be regarded as a purchaser in good faith and for a valuable consideration, and under the provisions of its charter and its agreement with the city, and the ordinance of the board of aldermen following the agreement, it would seem to have entered upon Fourth Avenue under all the restrictions in these various documents contained, and was in no sense the exclusive owner of the fee of the street, getting title from a private grantor.

The charter of the company is found in the Laws of 1831. The agreement bears date January 9th, 1832, and the ordinance was passed by the board of aldermen on January 20th, 1832.

In less than twenty years after any of these dates the city began condemnation proceedings to widen Fourth Avenue, which was then 100 feet wide, and it was proposed to add twenty feet on each side, which was condemned, and the 100 feet, representing the old street, was marked "ceded." It does, however, appear in some of these litigations that a decree of condemnation went in form against the Harlem Railroad Company as to the portion of the street occupied by it, declaring a condemnation in consideration of one dollar. This report was confirmed sometime in the year 1850.

The changes in Fourth Avenue, as it was then called, and the railroad structure under the act of 1872, resulted in a new state
of affairs as to the grade of the tracks, both on viaducts
(560) and in cuts, which were not completed until 1878. It, therefore, follows that the contention of the defendants, as to undisputed title in the avenue, in front of the plaintiff's premises, cannot be maintained.

The claim that the act of 1892 is unconstitutional cannot be sustained.

If it be true that the defendants have no legal right, by reason of grant or prescription, to erect this steel viaduct to the height of 31 feet in front of the premises in question, the effect of the act of 1892 is simply, as in the elevated railroad cases, to authorize the construction of this viaduct structure in the avenue, subject to the rights of abutting owners, to the extent that their easements of light, air and access have been invaded.

The mere fact that the act does not provide for compensation has no controlling effect. The legislative sanction to construct what would otherwise be a nuisance in a public street does not imply the power to take the easements of abutting owners, which are property, without compensation.

The fundamental error in the *Fries* case is the assumption that the doctrine of *damnum absque injuria* is applicable.

In the prevailing opinion in that case the learned judge said: "So we have the case of a change of grade in a street, which necessitated a change in the location of the railroad tracks, all made under a valid statute, and that alone is said to constitute the alleged trespass."

If this statement was correct, it would be too clear for argument that the doctrine of *damnum absque injuria* would apply to this case.

The fact is that there was no change of the grade in Park Avenue. The title of chapter 339 of the Laws of 1892 reads: "An act to regulate, improve and enlarge Park Avenue above 106th Street in the city of New York, and providing for the passage of intersecting streets, under the railroad structure of the New York and Harlem Railroad Company, *and for the elevation of said railroad structure, and for changing the grade of said railroad*, and for the construction of a
(561) new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary *by reason of such change in structure and grade and increased elevation of bridge*, and for other purposes."

It is profitable at this point to consider in detail the history of this act.

The Federal government determined to raise the height of the bridge which was in use by the railroad companies The State of New York, as in duty bound, passed this act in question to carry out the change which Congress had decided should take place.

This act in brief directed that the grade of the Harlem Railroad Company's track should be raised between 106th Street and the Harlem river. This was done in order to accommodate it to the new bridge.

The mayor of the city of New York was authorized by sec-

tion thirteen to appoint a board to be known as "The Board of the Park Avenue Improvement above 106th Street," whose duty it was to execute contracts and superintend the construction of said improvement. Upon the completion of the work the counsel to the corporation of the city of New York was required by section sixteen to apply to the Special Term of the Supreme Court in the first department for the appointment of commissioners to determine the area of assessment to raise money to pay for the bonds to be issued by the city in payment of its share of the work.

The act provided that the city of New York should pay one-half and the railroad company the other half of the cost of this work if it did not exceed a million five hundred thousand dollars; if it exceeded that amount the railroad company was to pay the entire excess.

As I understand the *Fries* case, the majority of the court held (1) that this was work of a public nature, and that the railroad company was not liable for injury to the easements of light, air and access unless there was a want of skill, or
(562) negligence, in the performance of the work; (2) that the principles of law relating to the change of grade of streets, when lawfully made, are applicable to this situation, and that the doctrine involved in the elevated railroad cases has no application.

The act upon its face shows that the legislature did not consider it was providing for a public work for which the state was to be liable. The provision that a small portion of the city and the railroad company shall pay between them the cost of this work, and if it exceeded a certain sum the excess should be paid by the railroad company, is conclusive evidence that it does not contemplate a public work, inflicting damages which can only be recovered under a special provision of law, or by showing negligence or want of skill in the performance thereof.

The raising of the bridge by act of Congress contemplated, it is reasonable to suppose, the making of the navigable tide waters of the Harlem river accessible to vessels of greater draught, with taller masts and smokestacks, thereby benefiting the city of New York and incidentally the great railroad corporations using this bridge, they being interested in the growing prosperity of the municipality and the improved facilities for entering the city of New York by land and water.

These considerations and the details of the act already referred to, lead me to the conclusion that this work was not of the character assumed by the prevailing opinions in the *Fries* case. If it were of that character, then it was unjust, and even unconstitutional for the legislature to have imposed

any portion of the cost of this work upon the railroad corporations and a small section of the city of New York included in an area of assessment to be fixed by commissioners.

We thus have a situation presented similar to that in the elevated railroad cases, to wit: An elevated structure in the center of a public street, extending in places to the height of thirty-one feet, for the express purpose of elevating the railroad tracks so as to connect with the new bridge.

In my opinion to hold that the act of 1892 provides for raising the grade of Park avenue, is judicial legislation,
(563) and introduced in the *Fries* case a fact not disclosed by the act itself, and not discussed at our bar when that case was argued.

These cases present a situation covered by the case of *Reining* v. *N. Y., L. & W. Ry. Co.* (128 N. Y. 157). While the case cited does not present facts similar to the one at bar, yet the principle involved is precisely the same.

It was there held that a municipality could not, under the guise of exercising the power to alter the grade of a street, appropriate a part of the street practically to the exclusive use of a railroad company and cut off abutting owners without compensation from using any part of it in the accustomed way. In other words, this was a limitation of the power of the common council conferred upon it by the legislature in the city charter of Buffalo.

Judge ANDREWS, in applying the law of elevated railroad cases, as laid down in the *Story* case, said: "It is no longer open to debate in this State that owners of lots abutting on a street, the fee of which is in the municipality for street uses, although they have no title to the soil, are nevertheless entitled to the benefit of the street in front of their premises for access and other purposes, of which they cannot be deprived except upon compensation."

It was expressly held in the case cited that the erection of an embankment in the street, and running parallel therewith, and occupied by a railroad company, was not a change of the grade of the street.

That the legitimate change of the grade of a street, to the damage of abutting lot owners, is damage without injury, is the settled law of this state, but it involves a principle that has been condemned in many jurisdictions, and the hardship of which has been cured in some of the states by constitutional amendment providing for the payment of such damages. It is a doctrine which ought not to be extended.

I am of opinion that the law controlling the elevated railroad cases is applicable here, and that the decision in the
(564) *Fries* case reversed a rule of property under which millions of dollars have been paid out by the elevated

railroad companies to abutting owners who had no title to the street.

The New York and Harlem Railroad Company is not vested with any title in Park avenue that permits it as the owner of real estate to erect this elevated structure without regard to the injury it may work upon the easements of light, air and access enjoyed by abutting owners. They must settle for damages caused by so much of the structure as exceeds established user.

In several of the cases now before us it appears that the city received a conveyance of the fee before the railroad company took the deeds from grantors, who practically had nothing to convey. In another case there is a title under condemnation proceedings against an infant in 1830, presumably securing to the railroad company the right to operate its road on the strip twenty four feet wide.

The details of the railroads' title were carefully and elaborately examined in the *Lewis Case* (*supra*).

I am of opinion that this invasion of the easements of abutting owners has vested in them a valid claim against the railroad company, and if this court adheres to its decision to the contrary, on the ground that it was a public work ordered by the state, then these damages are a valid claim against the state.

I have no disposition to urge, unduly, the reconsideration of the principles of law laid down in the *Fries* case. I understand that the court desires a full and free discussion of this entire question. I shall be content, if a result is reached in these cases adverse to the plaintiff, so long as I place myself on record as dissenting, on the ground that it reverses the *Lewis* case and adopts a principle that is at war with the long line of decisions in the elevated railroad cases and the established law of the state.

If this judgment is reversed it should be without costs.

I vote for affirmance.

CULLEN, *J.* (dissenting). I concur in the opinion (565) of Judge BARTLETT and dissent from the decision about to be made. I feel that I am not precluded from taking this course by the previous decisions of this court, for against the authority of the *Fries* case may be fairly set off that of the *Lewis* case. But the court having on this appeal re-examined the whole question involved in both the cases cited, and determined that the plaintiff is not entitled to compensation for the injuries to his property complained of, I must hereafter subordinate my judgment to that of the majority, and shall regard subsequent discussion of the question as foreclosed by the action of the court in the present case.

HAIGHT, MARTIN and WERNER, *JJ.*, concur with PARKER,

Ch. J.; BARTLETT, *J.*, reads dissenting opinion, and CULLEN, *J.*, concurs in memorandum; GRAY, *J.*, not sitting.

Judgment reversed, etc.

Court of Appeals.

JOHN KEIRNS, Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY, *et al.*, Appellants.
} 173 N. Y., 642.

Argued November, 1902; decided February, 1903.

Per Curiam.—Judgment reversed and the complaint dismissed, without costs, upon the authority of *Fries* v. *N. Y. & Harlem R.R. Co.* (169 N. Y., 270), and *Muhlker* v. *N. Y. & Harlem R.R. Co.* (173 N. Y. 549).

VANN, *J.* (concurring):

The plaintiff's property is in the next block to that in which the property of the plaintiff in the *Lewis* case was situated. (*Lewis* v. *N. Y. & Harlem R.R. Co.*, 162 N. Y. 202.) The essential facts of the two cases differ in no particular that would prevent a recovery in one unless they would also prevent a recovery in the other. Since the decision of the *Lewis* case, however, the *Fries* case has been before us, in which a new point in the litigation was discovered by a majority of the court that was not raised by counsel or considered by us in the former case. (*Fries* v. *N. Y. & Harlem R.R. Co.*, 169 N. Y. 270.)

The *Lewis* case was argued and decided upon the theory that the entry of the railroad company into Park avenue was in subordination to the legal title of the city; that by user for more than twenty years the company obtained by prescription as against the abutting owners the right to maintain a permanent structure within the same limits and at the same height as previous structures, and to the extent of the com-
(643) pany's user for twenty years acquired the exclusive right to interfere with the easements of light, air and access; that the railroad company could not be charged with the damages which the easements of the abutting owners suffered from the construction, itself, by a governmental agency, of the last structure, but that when the defendants used it they became liable from that time for such damages as the easements suffered from such user to the extent of the increased height of the third structure, after deducting the benefits received from increased facility of access.

On the other hand, the *Fries* case was decided upon the theory that, as against the abutting owner with no title to the avenue, the state had the right to require the grade upon which the railroad was run to be changed; to cause to be

erected a steel viaduct, and to compel the defendants to run their trains thereon, and in the absence of any statute providing for compensation, that they were not liable for remote or consequential damages sustained by the abutting owners.

This point, although radical, was entirely new, and had it been raised in the *Lewis* case might have resulted in a reversal instead of an affirmance. While the judgment of the court in that case was by the unanimous vote of all the judges who sat, and the judgment in the *Fries* case was by a bare majority, and while I regret the result reached in the latter as amounting to the confiscation of property belonging to abutting owners, and a gift thereof to railroad corporations, I now yield to it as establishing the law of the state, since the principle upon which it rests has been sanctioned and applied in another case by this court. (*Muhlker vs. N. Y. & Harlem R. R. Co.*, 173 N. Y., 549.)

I concurred in the dissenting opinion of Judge Cullen in the *Fries* case and should have concurred in that of Judge Bartlett in the Muhlker case had I sat when it was argued, but I regard the question as now settled, and by the rule of *stare decisis* I am compelled to vote for reversal.

PARKER, *Ch. J.*, BARTLETT, HAIGHT, MARTIN and WERNER, *JJ.* (and VANN, *J.*, in memorandum), concur; GRAY, *J.*, not sitting.

Judgment reversed, etc.

Court of Appeals.

HEDEWIG KRIETE, Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY, *et al.*, Appellants.
} 175 N. Y., 484.

Argued May, 1903; decided June, 1903.

Per Curiam:

We decide on authority of the *Fries Case* (169 N. Y., 270), and the *Muhlker Case* (173 N. Y., 549), that under the statute requiring the structure complained of the plaintiff has no remedy against this defendant.

The constitutionality of the statute being questioned, we hold (1) that it does not violate the State Constitution, (2) that it does not offend against that provision of the 14th amendment of the Federal Constitution providing that a person shall not be deprived of property without due process of law, and (3) that it does not contravene section 10 of article 1 of the Federal Constitution forbidding the impairment of the obligation of a contract.

The judgment should be reversed and the complaint dismissed, without costs.

PARKER, *Ch. J.*, O'BRIEN, HAIGHT, MARTIN, CULLEN and WERNER, *JJ.*, concur; GRAY, *J.*, not sitting.

Judgment reversed, etc.

Court of Appeals.

NORA DOLAN *et al.*, Respondents,
v.
THE NEW YORK AND HARLEM RAILROAD COMPANY *et al.*, Appellants, Impleaded with Another.

175 N. Y., 367.

Argued May, 1903; decided June, 1903.

HAIGHT, *J.*:

This is one of a group of actions brought by the abutting owners on Park avenue in the city of New York to restrain
(368) the maintenance and operation of the defendants' railroads upon the viaduct structure through that street, or, as an alternative, to recover damages resulting to the fee and rental value of the premises.

The plaintiffs' premises are situated on Park avenue, between 124th and 125th streets, abutting upon the de-
(369) fendants' railroad stations at 125th street. The station is upon the viaduct structure, widened out so as to provide a suitable platform on which passengers may enter or alight from trains, and is reached by stairways from the street.

The complaint in this action demands judgment that the defendants be enjoined from maintaining a station, platform and appurtenance thereto in front of the plaintiffs' premises, as well as that of the elevated railroad structure. The trial court awarded judgment in favor of the plaintiffs for fee and rental damages, which included the damages suffered by reason of the operation of the defendants' trains upon the viaduct. For this reason the judgment must be reversed, upon the authority of *Muhlker* v. *New York & Harlem Railroad Co.* (173 N. Y. 549) and *Fries* v. *New York & Harlem Railroad Co.* (169 N. Y. 270). The only question remaining to be determined upon this review is as to whether the complaint should be dismissed or a new trial granted, and the determination of that question involves an inquiry as to whether the plaintiffs can recover damages by reason of the construction and maintenance of the defendants' depot at that place.

Prior to 1892, the defendants had acquired the right to maintain and operate their railroad through Park avenue in a subway or cut bounded on either side by walls of masonry. This not only prevented the use of a large portion of the street for municipal purposes, but it also seriously interfered with the passage of teams between those portions of the city

lying on opposite sides of Park avenue. Under these circumstances the legislature enacted chapter 339 of the Laws of 1892. By this act a board was created to erect a steel viaduct through Park avenue from 111th street to the Harlem river, and after its completion the defendants were required to run their trains over the viaduct. The cut in the street was then required to be filled, and the surface paved.

The evident purpose of this legislation was to
(370) open up Park avenue as a street through its entire width, and to facilitate travel across the same between the portions of the city lying on either side of the street. This was a public improvement effected through a governmental agency, over which the defendants were given no voice or power to control the operations of the board. It was consequently held in the cases to which we have referred, that the defendants were not liable for the damages resulting to abutting property owners from the operations of their trains on the viaduct. The same statute further "authorized and permitted" the defendants, at their election, to erect station houses on both sides of the railroad at 125th street with platforms extending from the north line of 124th street to the south line of 125th street. This statute was amended by chapter 594 of the Laws of 1896, in which the defendants were not only authorized but *directed* to erect and maintain such stations, specifically specifying the size, place and character of the structure.

It is contended on behalf of the defendants that inasmuch as they were compelled to construct the stations, under the amendment of the act, they are relieved from liability for damages to abutting owners of property, upon the same theory and for the same reasons that they have been relieved from liability for the construction of the viaduct. But we think there is a controlling distinction between this and the former cases, and that our decisions in the *Fries* and *Muhlker* cases have no application. In those cases, as we have seen, the government built the structure for the purpose of effecting a great public improvement. In this case the government requires the defendants to provide suitable and proper facilities to enable their patrons to safely and conveniently enter and alight from their trains. A railroad corporation in accepting a charter from the state impliedly undertakes to afford reasonable and proper facilities for the transportation of passengers and freight, and if it neglects it may be compelled to discharge its duty in this regard. Under the General Railroad Law the construction and maintenance of depots is committed to the judgment of the railroad commission-
(371) ers, who are empowered to direct as to the station houses and terminal facilities that shall be provided.

Under the amendment of 1896 the legislature, so far as these defendants are concerned in Park avenue, has superseded the railroad commissioners, and has by act specified the character, size and location of the stations, and that is all. To our minds the situation is not different from that which would be presented if the railroad commissioners had required a depot and terminal facilities at any other point upon the defendants' lines. If, in complying with such requirements, additional land should be required, it would become the duty of the railroad company to acquire the same and pay therefor. So in the case under consideration. If the station houses occupy more of the street than the viaduct and tend to deprive the plaintiffs of their easements of light, air and access, we think the defendants should pay therefor. The station houses are not constructed by the government for the purpose of accomplishing a public improvement, but are required by the government to be constructed by the railroad companies, under their implied contract with the state, to afford suitable and proper facilities for the accommodation of their own patrons.

While no damages could be awarded by reason of the construction of the viaduct, or of the operation of the trains of the defendants thereon, both fee and rental damages may be awarded, if suffered in consequence of the station houses. We consequently conclude that a new trial should be ordered.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

PARKER, Ch. J., O'BRIEN, MARTIN, CULLEN and WERNER, JJ., concur; GRAY, J., not sitting.

Judgment reversed.

Court of Appeals.

AUGUSTA A. KETCHAM, Respondent,
vs.
NEW YORK AND HARLEM RAILROAD COMPANY, *et al.*, Appellants.
177 N. Y., 247.

Argued January, 1904; decided January, 1904.

BARTLETT, *J.*:

This action is brought to recover fee and rental (248) damages of the defendants by reason of the erection of their passenger station at 125th street in the city of New York. The plaintiff's premises are situated on the southwest corner of Park avenue and 126th street, being a plot of seventy-five feet on Park avenue and ninety feet in depth, upon which are erected one-story buildings used for stores, said premises being known by the street numbers 1834, 1836 and 1838 Park avenue. The 125th street

station extends north to 126th street and is consequently in front of plaintiff's premises.

The plaintiff, according to the prayer of her complaint, seeks to perpetually enjoin the defendants from maintaining, continuing or using the elevated railroad structure and its appurtenances and the station, station platform, stair-
(249) ways and appurtenances, tracks, switches, ties, stringers, girders and rails in front of, over or adjacent to plaintiff's said premises, and that defendants be required forthwith to remove said railroad structure, etc., unless the defendants pay to the plaintiff such sum or sums as may be found to be the value of the easements of which the plaintiff has been deprived.

The trial court found (finding IV) that the defendants erected a passenger station at 125th street and Park avenue, a solid iron structure, in front of the plaintiff's premises, which was eventually modified so as to be eighty-two feet wide and twenty-three feet and three inches high.

Finding V reads: "By the adoption of plans for the station, and by the increase of the width and alteration of the structure for the sole purpose of accommodating the station, and by the work done by the defendants themselves or by their contractors, the defendants became parties to the process of construction at this point of the station buildings and appurtenances from the time of the commencement of the work in August, 1893, to its completion in November, 1897."

Finding IX reads: "The plaintiff has suffered damages by reason of the increase of inconvenience from the operation of trains *upon the viaduct structure* since the 16th of February, 1897, not including that from noise, and in the erection and maintenance of a passenger station at 125th street, *and the passing, starting and stopping of numerous trains thereat*, in the depreciation of the value of fee of her real estate in the sum of $11,500, and in the loss of rents from the 16th of February, 1897, down to the date of trial, in the sum of $5,500; the said sums * * * represent as to fee damages and rental damages, respectively, the net difference measured in money between the physical effect of the *former operation of the railroad* upon the premises in suit and the physical effects *produced by the new elevated structure, including the station and its appurtenances* and its use, less benefits conferred upon the same premises by reason of increased traveling facilities and increased traffic."

As this case is one of a large number involving the
(250) same situation, it is deemed proper to state what this court has already decided and to point out the one question which has been left open.

This court has decided that the steel viaduct in Park avenue, upon which the defendants' railroads are now operated, ex-

tending from 104th street to the Harlem river, was a public improvement effected through a governmental agency, and that defendants were not liable for damages resulting to abutting property owners from the maintenance of the structure or the operation of trains thereon. (*Muhlker* vs. *N. Y. & Harlem R.R. Co.*, 173 N. Y., 549; *Fries* vs. *N. Y. & Harlem R.R. Co.*, 169 N. Y., 270.)

It has also been decided "that the station houses are not constructed by the government for the purpose of accomplishing a public improvement, but are required by the government to be constructed by the railroad companies under their implied contract with the state to afford suitable and proper facilities for the accommodation of their own patrons." (*Dolan* vs. *N. Y. & Harlem R.R. Co.*, 175 N. Y., 367.)

A single question is presented by this appeal, the defendants, appellants, contending that the findings of the trial court include, not only the damages, fee and rental, arising from the construction of the station at 125th street, but embrace damages produced by the new elevated structure, including the station and its appurtenances.

The plaintiff insists that, reading the fifth and ninth findings together, it is clear that the trial court limited the damages to the construction and operation of the station.

We are of opinion that the contention of the appellants must be sustained, as it seems to us clear, on a careful reading of the findings, that the trial court did not confine its award of damages to the erection and maintenance of the station building and appurtenances.

Finding IX distinctly states that the plaintiff "has suffered damages by reason of the increase *of inconvenience from the operation of trains upon the viaduct structure* since the 16th of February, 1897, not including that from noise, *and* in the erection and maintenance of a passenger station at
(251) 125th street, and the passing, starting and stopping of numerous trains thereat."

This finding further states, after fixing the fee and rental damages, that they represent "the net difference measured in money between the physical effect of the *former operation of the railroad upon the premises in suit and the physical effects produced by the new elevated structure, including the station and its appurtenances and its use, less benefits conferred upon the same premises by reason of increased traveling facilities and increased traffic.*"

It is clear from the phraseology of this finding that the trial court did not confine the assessment of damages to the station and its appurtenances, but considered the former operation of the railroad upon the premises in suit and the physical effects

produced by the new elevated structure, including the station and its appurtenances.

In *Dolan* v. *N. Y. & Harlem R.R. Co.* (175 N. Y., 367), Judge HAIGHT, writing for the court, said (p. 371): "If the station houses occupy more of the street than the viaduct and tend to deprive the plaintiffs of their easements of light, air and access, we think the defendants should pay therefor."

This language is, in general terms, an indication of the rule of damages to be applied in these station-house cases which have survived the former decisions of this court. It is desirable that the rule should be clearly stated for the guidance of counsel in the trial of similar cases.

If the plaintiff proves that the steel viaduct has been extended beyond the width of the structure between stations, and is clearly a part of the work necessary in erecting the station, and an injury is established by reason thereof, proper damages should be awarded.

The judgment appealed from should be reversed and a new trial ordered, with costs to abide the event.

PARKER, Ch. J., O'BRIEN, HAIGHT, MARTIN and CULLEN, JJ., concur; GRAY, J., not sitting.

Judgment reversed, etc.

MOTION, NOTICE, AND ADDITIONAL
BEHALF OF DEFENDANTS

The undersigned, of counsel for plaintiff in error in the above-entitled cause, do hereby acknowledge service of a copy of the foregoing motion and notice and of the additional brief hereto attached this 24th day of December, 1904.

ELIHU ROOT,
JAMES C. BUSHBY,
L. M. BERKELEY,
Of Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

HENRY MUHLKER,
Plaintiff in Error,

against

THE NEW YORK AND HARLEM RAILROAD COMPANY and THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Defendants in Error.

Additional Brief on behalf of Defendants in Error.

Upon the oral argument some propositions were argued and certain questions were asked which have suggested doubt as to whether the exact position of the parties in this action in this Court have been quite clearly presented either by the oral arguments or by the briefs.

The learned counsel for the plaintiff, in his oral argument, laid great stress upon the trial Court's seventh finding or conclusion. The point which we wish to make perfectly clear is the character and status of that finding, as, under the New York State law, it constituted a subject matter upon and concerning which the jurisdiction of the Court of Appeals might be invoked and exercised, and as to the effect upon that finding or conclusion, of the reversal of the judgment by the Court of Appeals upon the ground that that finding or conclusion was not sustained by any evidence.

The plaintiff's position is:

(1) That he has, as appurtenant to his lot abutting upon Park Avenue, certain property rights, consisting of easements, over the entire strip of land, 140 feet in width, within the exterior lines of Park Avenue;

(2) That such property rights were created or grew out of certain instruments of grant and of the street opening proceedings;

(3) That such instruments of grant and the street opening proceedings constituted in favor of plaintiff and against defendants and all the world, a contract obligation that Park Avenue shall be kept open as and for a public street and for no other purpose;

(4) That the maintenance and use of the railroad structure

complained of is inconsistent with street use, and therein violates these contract obligations;

(5) That the trial Court found that the plaintiff had suffered actionable damage;

(6) That the Court of Appeals reversed the judgment below and dismissed the complaint upon the ground that Chapter 339 of the Laws of 1892 constituted lawful authority for such maintenance and use of this railroad structure without compensation to plaintiff;

(7) That said enactment as thus construed and administered by the Court of Appeals, is violative of the Federal Constitution in that (1) it impairs the obligations of the said contracts, and (2) it deprives plaintiff of the amounts awarded him by the trial Court as damage and compensation, respectively, and thus deprives him of his property without due process of law.

Plaintiff rests his whole contention upon the decisions in the elevated railroad cases, and recognizes no distinction between those cases, in which, after the opening, regulating and grading of the street, all of character strictly conformable to the provisions of the Act of 1813, and without any consent of the abutting owner, the elevated roads were constructed, and Park Avenue, which was neither opened, regulated, graded nor paved at the time of the construction of the Harlem road, but was opened many years after such construction, and then only to a partial extent, the street opening proceeding to acquire title to the land not being taken until 1850 and consummated in 1853; and the avenue to its full width never having been actually opened, regulated, graded or paved until after the erection of the structure complained of under the Act of 1892. Prior to and until that time, Park Avenue consisted of two streets, one on each side of the railroad, the strip of land occupied by the railroad never having, until the erection of the structure under the Act of 1892, been a public street for any purposes whatsoever.

The defendants have not sought to attack or overthrow the elevated railroad decisions; they admit and contend that those decisions are in full force and effect in the State of New York, but they claim that the conditions with respect to Park Avenue as affecting both the abutting property owners and the railroad companies are other and far different from those which have obtained in the streets in which the elevated railroads have been constructed.

The position of the defendants is:

(1) That the Act of 1892 does not in any manner take or authorize the taking of any private property without compen-

sation, nor has it in any manner impaired the obligation of any of plaintiff's contract rights, nor has it taken from him any right or remedy in respect to the enforcement of any such contract rights;

(2) That the Legislature of the State of New York had the right, both in the exercise of its police power for the purpose of improving the avenue, and under the authority reserved in the Charter of the Harlem Company, to pass the act providing for the maintenance and use of the elevated viaduct structure within the bounds of and upon and over the strip of land, which at the time of the enactment was, rightfully as against plaintiff, possessed, occupied and used exclusively by and for the railroad;

(3) That the decision of the Court of Appeals is a determination that the plaintiff's contention that he owned and was entitled to possess the property or property rights which he claimed were trespassed upon or taken, in and by the carrying into effect of the Act of 1892, is fully met, answered and overthrown by the finding and conclusion that as against plaintiff defendants had acquired the right to exclusively possess and occupy the same 60-foot strip of land and thereon to maintain and operate their railroad as they had done prior to the 1892 enactment.

Plaintiff upon the argument relied principally upon his alleged contract rights, and apparently relied upon the "Seventh" finding of the trial court to the effect that he had suffered actionable damage.

In attempting, however, to take advantage of this finding in this Court he is met by an insuperable difficulty, in that this railroad structure is wholly upon ground which prior to 1892 was possessed, occupied and used exclusively by and for the railroad, and this leads to a consideration of what the findings of the State Court, as they come to this Court, are.

It is to be observed, first, that by the "Ninth" finding of the trial court the defendants were not liable for the structure upon and within which its four tracks were operated prior to the erection of the structure under the Act of 1892. That structure was enclosed by retaining walls wholly excluding any street use, and was admitted by counsel for plaintiff upon the argument, to have been inconsistent with street use. This "Ninth" finding has been confirmed by all the State courts. It is in full force and effect here, and is not attacked by plaintiff here.

In the second place, the Court of Appeals has found and adjudged that the "Seventh" finding of fact was not sustained by any evidence, the effect of which is a finding of the highest State Court, that no actionable damage has been sus-

tained by plaintiff, that is, that none of his property has been taken or trespassed upon.

The right of presentation of this question to and for the determination of the Court of Appeals, in case of the decision of the Appellate Division not being unanimous, was saved in favor of the defendants, by their motion interposed in the trial court at the close of the entire testimony, asking dismissal of plaintiff's complaint, upon, among others, the following grounds:

> "1. That the plaintiff has failed to show that he had any property rights which were or have been taken by the defendants, or either of them" (printed record, page 61);

and defendant's exception to the order denying that motion (printed record, page 63).

Having in view the trial court's "Seventh" finding or conclusion "That the said permanent structure and the operation by said defendant The New York Central and Hudson River Railroad Company of passenger trains thereon since February 16th, 1897, are and have been a continuous trespass upon the plaintiff's easements of light and air appurtenant to his said premises, hereinbefore described," causing damage in the sums named and awarded; and the Court of Appeals judgment that the judgments of the lower courts be reversed and the complaint dismissed, the crucial question presented is: Upon what grounds did the Court of Appeals thus determine and adjudge?

The plaintiff's contention is that the Court of Appeals had no jurisdiction to inquire into or determine the question of the correctness of the above finding or conclusion of the trial court, and hence that the Court of Appeals was obliged to and did accept that finding or conclusion as binding and conclusive upon it, and in the face of and notwithstanding such legal force and effect of that finding or conclusion, held and adjudged that the 1892 enactment constituted lawful authority for the maintenance and use of the said railroad structure without compensation to plaintiff.

The defendants' contention is that the Court of Appeals possessed and exercised the province and jurisdiction of searching the record for the purpose of ascertaining and determining whether that finding or conclusion of the trial court was sustained by *any* evidence, and upon and by reason of its determination that the finding or conclusion was not thus sustained, determined and adjudged that plaintiff's property had not been taken or trespassed upon; that the damage awarded was not occasioned by, and was not the result of any actionable wrong, but was merely consequential to and upon

lawful exercise of lawful right as against plaintiff, and therefore *damnum absque injuria*.

The question as to which of these grounds the Court of Appeals was empowered to and did proceed upon is answered by reference to section nine of article six of the State Constitution, and sections 190, 191 and 1337 of the Code of Civil Procedure. The paragraph of section nine of article six of the State Constitution, here in question, reads as follows:

> "No unanimous decision of the appellate division of the supreme court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the court of appeals."

The first part of subdivision 1 of section 190, reads as follows:

> "Appeals may be taken as of right to said court, from judgments or orders finally determining actions or special proceedings." * * *

Section 191, subdivisions 3 and 4, read as follows:

> "3. The jurisdiction of the court is limited to a review of questions of law.
>
> 4. No *unanimous* decision of the appellate division of the supreme court that there is evidence supporting or tending to support a finding of fact or a verdict not directed by the court, shall be reviewed by the court of appeals."

The portion of section 1337 pertinent hereto, reads as follows:

> "* * *; but where the justices of the appellate division from which an appeal is taken are divided upon the question as to whether there is evidence supporting, or tending to support, a finding or verdict not directed by the court, a question for review is presented." * * *

The essential issue of fact submitted for determination was that presented by plaintiff's affirmance and defendants' denial that the defendants' maintenance and use of the successive respective railroad structures constituted a taking of or trespass upon plaintiff's property, to wit: his easements in Park Avenue appurtenant to his described abutting premises, to his damage in the sums alleged.

Upon the issue of the alleged trespass the evidence submitted at the trial presented no substantial conflict of fact.

The trial court's "Seventh" finding or conclusion that the maintenance and use of the elevated viaduct railroad structure "are and have been a continuous trespass upon the plaintiff's

easements," was based entirely upon the trial court's legal conclusion arising from or upon the matter of law view taken by it of the evidence pertaining to that issue, and not upon determination of a question of fact arising upon or in respect of conflicting evidentiary facts.

The case came to the Court of Appeals upon an affirmance by the Appellate Division of the judgment at Special Term. It did not affirmatively appear in the record of the case that the decision of the Appellate Division was unanimous, and hence the Court of Appeals could not find that there was unanimity.

Kaplan *vs.* N. Y. Biscuit Company, 151 N. Y., 171.
Laidlaw *vs.* Sage, 158 N. Y., 73.

In the case at bar, it appears affirmatively on pages 71 to 73 of the printed record, in the recital, "Van Brunt, *P.J.*, dissents," that the decision of the Appellate Division was not unanimous.

This being the situation, the Court of Appeals had power to look into the record to see whether there was *any* evidence to support the facts found by the trial Court, which is a question of law for the Court.

Otten *vs.* Manhattan Railway Company, 150 N.Y., 395.
Griggs *vs.* Day, 158 N. Y., 1.
Ostrom *vs.* Greene, 161 N. Y., 353.
Jerome *vs.* Queen City Cycle Company, 163 N. Y., 351.
Henken *vs.* Schwicker, 174 N. Y., 298.
Dunlap & Co. *vs.* Young, 174 N. Y., 327.

In the first of these cases, the Court, per Vann, *J.*, say, at page 401:

> "Whether there is a question of fact in a case is always a question of law, depending possibly upon a conflict of evidence, and possibly upon conflicting inferences which may be drawn from uncontradicted evidence."

In Griggs *vs.* Day the Court, per Haight, *J.*, say, at page 10:

> "Where the facts are controverted and they must be determined from conflicting testimony or inferences drawn from the surrounding facts, the question becomes one of fact and not of law, and this Court has no power to review. But where the facts are conceded or are not controverted, a question of law arises as to the judgment that should be given thereunder."

Ostrom *vs.* Greene was an appeal from a judgment of the Appellate Division affirming a judgment in favor of the plain-

tiff, entered upon a decision of the court after a trial without a jury. The Court, per Vann, *J.*, say at pages 356, 357:

"The trial court found * * *. The findings were excepted to, but under the rules governing appeals to this court, those relating to the facts of the case are conclusive, unless it appears that they were made without evidence to support them. According to our judicial system the trial courts and the appellate divisions finally pass upon all questions of fact, and the power of the Court of Appeals is limited by the Constitution 'to the review of questions of law.' Whether there was any evidence to support a fact found is a question of law, which, when the affirmance by the Appellate Division is not unanimous, we can review, but in no other way can we deal with a question of fact in a civil case, even if we think it has been improperly decided."

The case of Jerome *vs.* Queen City Cycle Company was an appeal from a judgment of the Appellate Division affirming a judgment entered in favor of the plaintiff after a verdict of a jury. The Court, per Vann, *J.*, say, at page 357:

"* * * As the judges of the court below do not appear to have been unanimous in their decision, we have the right to read the record in order to see whether there was any evidence which, according to any reasonable view, would sustain the conclusion of the jury. If the undisputed facts, in connection with the testimony of the plaintiff, when supported by every inference that can properly be drawn therefrom, do not warrant the verdict, a question of law arises, which we can review. Uncontradicted facts, with the logical deductions therefrom all pointing in the same direction, present a question of law for the court, and not a question of fact for the jury. * * *"

The case of Henken *vs.* Schwicker was an appeal from an order of the Appellate Division reversing a judgment in favor of the defendant entered upon a decision of the Court after a trial without a jury. The Court, per Werner, *J.*, say, at page 300:

"The learned trial Court held with the defendants, and decided * * *. The decision was in the short form. The learned Appellate Division reversed the judgment entered upon this decision. The order of reversal, being silent as to the facts, must be presumed to have been based solely on questions of law. As there is no contest over the rulings of the trial Court in the reception and rejection of evidence, there are only two questions open for review upon this appeal:

1. Is the finding of fact, upon which the judgment herein is founded, supported by any evidence?

2. Is the conclusion of law supported by the finding of fact? * * *."

The case of Dunlap & Co. *vs.* Young was an appeal from an order of the Appellate Division reversing a judgment in favor of the defendant after a trial by the Court without a jury. The Court says, per Curiam, at page 329:

> "The order of the Appellate Division does not state that the reversal was upon a question of fact, and, consequently, we must presume that it was on the law. In this condition of the record there are only three questions of law which we are permitted to examine: (1) Whether a material error was committed in receiving or rejecting evidence; (2) whether the conclusion of law is supported by the facts found; (3) whether any material finding of fact is without evidence to support it." * * *

In and by the exercise therein of the jurisdiction which it asserted and exercised in the cases cited the Court of Appeals undertook and assumed the determination of the question whether there was any evidence sustaining or tending to sustain the trial Court's finding or conclusion that in and by the maintenance and use of this elevated viaduct structure upon and over land theretofore rightfully as against plaintiff, occupied and used exclusively for railroad purposes, and thus maintained and used in obedience to the command of the State, having for its purpose the enlargement of the surface of this avenue for public travel, the plaintiff's easements had been taken or trespassed upon; and, in view of the entire record in the case, held and adjudged that the trial Court's finding or conclusion, that the maintenance and use of the elevated viaduct structure constituted a trespass upon plaintiff's easements, was not sustained by any evidence.

Having reached the above conclusion the Court of Appeals deemed and treated that unsustained finding as erroneous in law, and the judgment founded thereon subject to reversal on that ground.

The case, therefore, comes to this Court with the finding and conclusion of the State Court of highest jurisdiction thereof that upon the undisputed facts appearing in the record the plaintiff has not suffered any actionable damage.

The defendants claim that this determination is simply an application of the rules and principles of local property law in force prior to the enactment of 1892, and remaining in force unaffected thereby, to the status of property right resulting from the grants expressed or implied antedating that enactment, and so presents no Federal question, and this is fully discussed in the main brief.

Under the procedure in the State of New York the Court of

Appeals could not have reached the conclusion which it did reach and reverse the judgment in the case at bar without having determined as above indicated that as matter of law the "Seventh" finding could not be sustained, and so declared the law of the case by reversing the judgment and dismissing the complaint.

The rule of law thus applied and administered, and in and by the application and administration of which the case was effectually and fully controlled and disposed of by the Court of Appeals, was as clearly and manifestly the rule of the local law of the State as was that which was held to control in the respective cases of *Radcliff's Executors* vs. *Brooklyn* (4 N. Y., 195); *Eldridge* vs. *Trezevant* (160 U. S., 452); *Pennsylvania College Cases* (13 Wall., 190); and *Marchant* vs. *Pennsylvania R.R. Co.* (153 U. S., 380).

This statement of the method in and by which the Court of Appeals reached its determination is a sufficient statement of the grounds of its decision, but further light as to the grounds upon which its decision was based is found in its opinion in this case and in other cases arising from the same or similar facts, notably the *Conabeer*, *Lewis*, *Fries* and *Welde* cases, which are set forth in full in the supplement to the brief of defendants in error, from which opinions we quote the following:

Conabeer case (Supp. to Brief, p. 64):

> "It is obvious that when the deed by Mrs. McGown to the New York and Harlem Railroad Company was given, it was understood between the parties that its railroad was to be built upon an embankment or viaduct in Fourth avenue, as it expressly provided not only that the grantee should have twenty-four feet of land in the center of the avenue during its corporate existence upon which to construct its railroad, but it also conferred upon the company the right to slope its embankment to the full width of the street. It is equally apparent that the grantor intended to confer upon the railroad company the right to construct, maintain and operate a steam railroad upon the premises so conveyed, and to thereby release it from any damages to her adjoining property arising from the proper exercise of that right. *Thus the property* now owned by the plaintiff which adjoins Fourth avenue *became burdened with the easements or right of the company to maintain and operate its railroad at that place*, so that neither the owner, nor her grantee, could recover damages for any injury to the property arising from the contemplated use, and could in no way interfere with the proper exercise of that right by the railroad company during its continuance."

(*Id.*, pp. 68, 69):

"In the case at bar the street at the place where the defendants' railroad was constructed was never opened or used as a public street of the city. The streets in Fourth avenue were, by the command of the statute, laid out upon either side of the railroad structure, and were the only streets ever actually opened in that avenue. So that the plaintiff never acquired or possessed any right to the use of Fourth avenue as a public street, except such as she now enjoys.

This case is *clearly distinguishable from the elevated railroad cases* upon which the plaintiff relies. *In those* cases there was *no grant by the abutting owners* of the right to use the street for the purposes for which it was used, and the appropriation of the street was held to be illegal, *while here* the use of the street was *legalized by a grant from the plaintiff's grantor*, as well as by the legislature and municipal authorities."

(*Id.* p. 70):

"Under the circumstances of this case, it is manifest that the abutting owners who derived their title from Mrs. McGown subsequent to her grant to the New York and Harlem Railroad Company were not entitled to have that portion of the avenue upon which the defendants' viaduct stands opened as a part of the public street, but that *the only streets* for public use which existed in Fourth avenue, or *to the use of which they were entitled*, were streets forty-two feet in width *upon each side* of the viaduct occupied by the defendants."

Lewis case (*Id.* p. 71):

"The plaintiff claims that the trial court erred in refusing to allow her damages for the effect of the new structures, both temporary and permanent, without considering the effect of the old structure. The defendants claim that the court erred in awarding any damages, or giving any relief whatever, to the plaintiff, because, as against her, they had the right to erect any railroad structure in the street, of any height, within the lateral lines of the old embankment."

(*Id.* p. 74):

"The plaintiff's appeal rests upon the proposition that she is entitled to the same relief that she would have been if there had been no railroad structure in the street prior to the erection of the steel viaduct."

(*Id.* p. 75):

"The easements of light, air and access, so far as they

had any practical existence prior to 1853 when the avenue was opened, were encroached upon by the first railroad structure, which, in front of plaintiff's premises, was a solid embankment 28 feet wide at the bottom and 10 or 12 feet high, walled in with stone. From 1853 until 1873, when the first improvement required by statute was made, the avenue was open and used as a street on either side of the railroad structure in the center, which continued to encroach upon the easements of the abutting owners. From 1873, when the embankment was converted into a viaduct 56 feet wide and 7 feet high in front of the *locus in quo* until 1894, when the last improvement required by statute was begun, the same encroachment continued. As to the plaintiff and her grantors there was an open, continuous and exclusive possession and enjoyment by the railroad company of the easements in question to the extent of the user during the periods named."

(*Id.* pp. 75, 76):

"The possession of the defendants was not subordinate to the plaintiff's title, nor permissive as to her, but openly hostile and necessarily known to be such, to her and her grantors, who made no objection until 1897. It was exclusive, definite and uninterrupted, for it absolutely excluded all from the part of the avenue occupied by the railroad structures. The obstruction was not out of view or knowledge, but in plain sight of the abutting owners, who, by making no objection, acquiesced in the situation. The question does not arise between the railroads and the city, which had consented in advance to the occupation, but between the railroads and the abutting owners, who had not so consented. Under these circumstances the old structures had stood in the street so long that the railroads acquired a prescriptive right to have them stand there forever, so far as the plaintiff is concerned. *The situation was the same in effect as if one of her grantors, while he owned her property, had conveyed to the defendants the right to permanently keep the stone viaduct where it stood and to use it indefinitely for railroad purposes.* To the extent of the user by the companies the plaintiff, through the acquiescence of herself and her grantors had parted with her rights when the present structure was erected. She could claim no damages on account of the old structure, so long as it stood there. She could claim no damages on account of any new structure erected in the same place, within the same lines, and for the same purpose, which inflicted no more injury upon her property than the old. *She could raise no question*

except such as she could have raised had she given a deed expressly assenting to the erection of the old structure."

Welde case (*Id.*, pp. 80, 81):

"The defendants' railroad is constructed and operated in this street, and has been for over sixty years. In January, 1832, one Isaac Adriance, the plaintiff's remote grantor, then owned the land described in the complaint and the land comprising what is now the bed of Park avenue or the street in question. At that time he executed and delivered to the Harlem Railroad Company a deed of a strip of land twenty-four feet in width in the center line of this avenue from the southerly side of One Hundred and Twenty-fourth street to One Hundred and Twenty-seventh street, 'together with the power of sloping their embankments or excavations so much farther beyond the lines of said premises hereinbefore granted as may be necessary to support their works, not, however, extending beyond the width of the avenue.' As the avenue was then one hundred feet wide, that was the utmost extent of the grant to the railroad, and it is conceded that whatever rights the defendants acquired under this grant may be asserted against the plaintiff, who has succeeded to the title of Adriance and is bound by any consent or conveyance by him for railroad purposes. It will be seen by the terms of this grant that the railroad was authorized, when necessary, to support the work, to place an embankment in the street to the width of one hundred feet at the bottom in order to procure a proper slope. It is also apparent that wherever it was necessary to make rock cuts or excavations through high ground, that the railroad was authorized to make excavations one hundred feet in width at the surface of the ground, or at least if that was necessary in order to give the proper slope to the excavation. *The question arises as to the proper construction of this conveyance.* It is obvious that the railroad and not the grantor was to be the proper judge to determine where excavations and embankments were necessary and the proper width and slope of the same within the limits of the one hundred feet. Whether the reasonable and practicable construction of this grant is that the railroad acquired thereby the consent of the property owner to the construction and maintenance of a railroad in the street as then laid out to the width of one hundred feet, or is limited to less than that by other considerations, is a question that would appear to be involved in the case, but may not be necessary to decide in view of the condition of the present record."

(*Id.*, pp. 82, 83):

"The findings of the court, as they appear in the present record, naturally suggests the following questions:

(1) *Did the Adriance deed, before referred to, operate as a consent by the plaintiff's predecessor in title to the maintenance and operation of the railroad in front of his premises in this street, covering a space not to exceed one hundred feet wide?*

(2) *Does the present viaduct structure, so far as it occupies this one hundred feet space, constitute any trespass or invasion of the plaintiff's droperty rights*, and, if so, to what extent? (*Conabeer* v. *N. Y. C. & H. R. R. R. Co.*, 156 N. Y., 474).

(3) *In view of the grant from the plaintiff's predecessor in title*, already referred to, and the acts of the legislature above mentioned, is this viaduct structure, upon which the railroad is operated, rightfully and lawfully in the street?

(4) This structure having been erected under the authority of the state itself, in a public street, in order to improve the street for public travel, can the plaintiff maintain an action to enjoin the operation of the railroad, or to recover damages against the defendants, in consequence of the existence of the structure, or its use by the defendants?

(5) The structure, including the changes made subsequent to the year 1896, having been erected in pursuance of the command of the legislature and in precise conformity with the plans and specifications indicated in the statute, *has the plaintiff any right of action* against the defendants *to enjoin* the operation of the railroad, *or to recover damages, in so far as the structure exists*, within the original limits of the street, that is to say, *within the one hundred feet?*"

Fries case (*Id.*, pp. 85, 86):

"There is considerable discussion upon the briefs of counsel who have argued the case concerning the effect of a deed to the railroad by the former owner of the plaintiff's property and many other details relating to the right of the railroad to construct and maintain the same in the street in front of the premises in question.

I cannot perceive how these questions can be of much consequence in the disposition of this appeal, since the trial court made an express finding that *under this deed* various resolutions and acts of the city authorities at various times and under certain statutes referred to,

and by lapse of time and the acquiescence of the plaintiff and his predecessors in title, the defendants, '*acquired the right* without liability to the plaintiff to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16th, 1897, as hereinbefore described.' Here we have an express finding that on and prior to the date named the defendants were entitled to have and maintain their railroad in the street in question *as against the plaintiff* and all the world, without let or hindrance from any one, and surely there could be no trespass upon the plaintiff's rights prior to that date. The trial court also found how the railroad had been maintained and operated on and prior to the date mentioned, as follows: 'The said railroad prior to February 16th, 1897, was operated along the center of said Park Avenue in front of the plaintiff's premises in a depressed cut about fourteen feet below the surface of said Park Avenue and sixty-one feet and eight inches wide, which said railroad cut was bounded on each side by parapet walls of about two feet six inches above the surface of said avenue, which said embankment or viaduct cut off access from one side of said avenue to the other, except at the intersection of 128th and 129th street, at which points there were bridges for vehicles and foot passengers across the said railroad cut.' *According to this finding the defendants had the right to maintain a railroad in front of the plaintiff's premises that practically cut him off from access to the opposite side of the street* except by means of bridges located at intersecting streets."

(*Id.*, p. 88):

"The railroad originally covered nearly 62 feet of the street surface. Now the elevated structure covers only 59 feet above the surface."

(*Id.*, p. 89):

"The elevated railroad cases in this court proceed upon the principle that, as against abutting owners, the railroad was unlawfully in the street, as *they had not consented to the construction or conveyed the right* to interfere with their easements. But in the case at bar we have an express finding that the defendant *had acquired the right as against the plaintiff* to use the street for the operation of the railroad. Hence, the principles upon which that mass of litigation proceeded have no application to this case, and so this court has held."

Muhlker case (*Id.*, pp. 97, 98):

"The facts in this case present the same question

that was before this court in the *Lewis Case* (162 N. Y. 202) and the *Fries Case* (169 N. Y. 270) and that is, whether defendant is liable for any damages that may have been sustained by plaintiff by reason of the interference with his easements of light air and access by the erection of the viaduct upon which its trains are now being run.

Defendant was incorporated in 1831, and in 1832 it took from one Poillon a deed to a strip of land 24 feet wide in the center of what is now known as Fourth avenue, in the city of New York, along which the premises belonging to plaintiff are situated. Subsequently double tracks were laid thereon and trains operated, and this continued until after 1872. In that year an act was passed (Ch. 702, Laws of 1872) under which the tracks were increased to four and were laid in a subway or cut bounded on both sides by masonry walls which rose to a height of three feet above the surface of the avenue. As soon as the work was completed the tracks were used for railroad purposes and so continued until the state compelled the road to abandon their use and to operate its cars upon the viaduct which was constructed by the state pursuant to ch. 339, Laws of 1892.

Without further reference to the history of the road in that avenue it may be said that *prior to* the time when the operation of its trains was transferred from the subway to the viaduct *it had acquired the right as against the abutting owners* to maintain its railroad and run its trains along and over Fourth avenue."

(*Id.*, p. 100):

"Although at the time of the decision of the *Lewis* case we accepted as sound the proposition that, when defendant commenced to use the steel viaduct, it started a new trespass upon the rights of the abutting owners for which it could properly be held liable, subsequent reflection persuaded the majority of the court that this was error. The reasoning which seemed to command the latter conclusion was, briefly, that the state, setting about making improvements in Fourth avenue which were to benefit the general public, *found defendant in possession of four tracks* in the middle of the avenue, *with the right to operate its trains upon them*, which it was enjoying. The state could not if it would—and probably would not if it could—deprive defendant of its right to operate its trains in the street. But it had the power in the public interest to compel it to run its trains upon a viaduct instead of in the subway. So the state builded the viaduct *over the part of the street formerly occupied by the subway*

and by lapse of time and the acquiescence of the plaintiff and his predecessors in title, the defendants, '*acquired the right* without liability to the plaintiff to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16th, 1897, as hereinbefore described.' Here we have an express finding that on and prior to the date named the defendants were entitled to have and maintain their railroad in the street in question *as against the plaintiff* and all the world, without let or hindrance from any one, and surely there could be no trespass upon the plaintiff's rights prior to that date. The trial court also found how the railroad had been maintained and operated on and prior to the date mentioned, as follows: 'The said railroad prior to February 16th, 1897, was operated along the center of said Park Avenue in front of the plaintiff's premises in a depressed cut about fourteen feet below the surface of said Park Avenue and sixty-one feet and eight inches wide, which said railroad cut was bounded on each side by parapet walls of about two feet six inches above the surface of said avenue, which said embankment or viaduct cut off access from one side of said avenue to the other, except at the intersection of 128th and 129th street, at which points there were bridges for vehicles and foot passengers across the said railroad cut.' *According to this finding the defendants had the right to maintain a railroad in front of the plaintiff's premises that practically cut him off from access to the opposite side of the street* except by means of bridges located at intersecting streets."

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Without further reference to the history of the road in that avenue it may be said that *prior to* the time when the operation of its trains was transferred from the subway to the viaduct *it had acquired the right as against the abutting owners* to maintain its railroad and run its trains along and over Fourth avenue."

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and compelled it to stop running its trains in the subway and and to run them on the viaduct instead. The state had the power to do *these* things and *all* of them, and defendant, *having the right* to move its trains over the street, which could not be taken away from it, *did not lose that right and become a trespasser* because it obeyed the command of the statute, which it could not refuse to obey, to operate its trains upon the structure which the state had built."

Respectfully submitted,

IRA A. PLACE,
Attorney for Defendants in Error.

THOMAS EMERY,
Of Counsel.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

October Term, 1907.

No. 96.

HENRY HUBLER,

Plaintiff in Error,

vs.

THE NEW YORK AND HARLEM RAILROAD COMPANY
AND
THE NEW YORK CENTRAL AND HUDSON
RIVER RAILROAD COMPANY,

Defendants in Error.

Brief for Defendants in Error, on Re-Argument.

IRA A. PLACE,
Attorney for Defendants in Error.

THOMAS KENNY,
Of Counsel.

Supreme Court of the United States.

HENRY MUHLKER,
Plaintiff in Error,

vs.

THE NEW YORK AND HARLEM RAILROAD COMPANY

and

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Defendants in Error.

October Term, 1904
No. 99.

BRIEF FOR DEFENDANTS IN ERROR, UPON RE-ARGUMENT.

This cause was argued orally before this Court on the 12th and 13th days of December, 1904.

Thereafter, upon permission granted by the Court, on January 3d, 1905, Defendants in Error filed an additional brief.

Thereafter, on January 23d, 1905, this Court directed a re-argument of the cause.

Counsel for Defendants in Error conceive that, in the briefs heretofore submitted, the facts have been fully stated, and that sufficient reference has been made to the authorities which should govern in reaching a correct conclusion of this controversy.

The case, however, is undoubtedly one which must stand upon its own peculiar facts, and we may possibly render some slight aid to the Court if we are able to state, clearly and in order, the facts upon which the State Court based its final determination.

And first it may be well if we can have clearly in mind the point of difference between the parties.

The Plaintiff is the owner of a lot abutting on Park Avenue. As appurtenant to that lot, he claims certain easements—as the right of light, air and access—over Park Avenue. The Defendants do not deny that he has certain easements as appurtenant to his property abutting on Park Avenue. The difference between the parties is simply as to the character and extent of these easements. The Plaintiff claims that these easements are of the same unlimited character and extent as they would have been if Park Avenue had been originally opened to its full width of 140 feet, under the Act of 1813, either without any railroad being upon this strip or as it would have been in case the City, at the time of the opening of the Avenue, had acquired all of the railroad and property rights of the Defendant and had caused the railroad to be wholly removed from the Avenue, as opened. In other words, he claims that he has the same unlimited easements in Park Avenue as an abutting property owner on Third Avenue or Sixth Avenue has over those avenues, which were opened, constructed, regulated, graded and paved long before the construction of the elevated railroads in those Avenues. The Defendants, on the other hand, claim that, by reason of all the facts which constitute the history of Park Avenue and of Defendants' railroad, such easements as Plaintiff has in Park Avenue are so limited in character and extent that Defendants' railroad may be operated therein in the form which has been authorized and required by the Legislature; that, whatever the character and extent Plaintiff's easements are, they are subject to the power of

the Legislature to determine the form and character of railroad operations within the lines of Park Avenue and subject to the right of Defendants to maintain and operate their railroad in accordance with such legislative determination.

The Plaintiff in Error here is one of about 175 plaintiffs, property owners abutting on Park Avenue, against the same defendants. They all came into the New York State Court, on its Equity side, for the purpose—and for the sole purpose—of having their alleged damages admeasured. Their very plain and simple proposition was: The defendants were operating their railroad on an elevated structure in Park Avenue; the railroads of the elevated railroad companies were being operated on elevated structures in Third and Sixth Avenues; the elevated railroad companies had been held liable to the owners of property abutting on Third and Sixth Avenues; therefore, the defendants were liable to owners of property abutting on Park Avenue. They were, however, at once met with the defendants' contention not only that Park Avenue and the easements appurtenant to property abutting thereon were other and different from Third and Sixth Avenues and the easements appurtenant to property abutting thereon, but that the relations of the defendants to the structure complained of were other and different from the relations of the Elevated Railroad Companies to the structures in Third and Sixth Avenues. This was the principal issue litigated in all the State courts. The facts upon which the question has turned are all conceded. They are embodied in acts of the Legislature, ordinances and proceedings by and on behalf of the City, various deeds and other instruments in writing, use and occupation by the defendants. The main question involved, therefore, was purely a question of law.

The only disputed question of fact involved in the controversy was as to whether or not plaintiff had sustained any actual damage; plaintiff claiming that he had sus-

tained substantial damage and defendants claiming that he had suffered no actual damage whatsoever, the advantages resulting from the changes wrought, under the Act of 1892, offsetting, or more than offsetting, any possible disadvantages.

The trial court decided against defendants on both questions; that is, it held that plaintiff had sustained actual damage, and it further held that such damage was an actionable injury and gave judgment for money damages accordingly, and in the alternative decreed that upon failure to pay the money damages these defendants should wholly remove a structure directed by the Legislature to be built, and in part paid for by the City of New York, a public improvement, neither the State nor the City being before the court.

The Appellate Division, the intermediate court of appeal, affirmed the judgment in all respects, but by a divided court.

Upon appeal to the Court of Appeals, the court of last resort in the State of New York, it was open to that court to examine both of these questions. The decision of the Appellate Division not being unanimous it could have examined the record to ascertain whether there was any evidence to support the finding of the trial court that the plaintiff had suffered actual damage. If it had found that there was no such evidence the question would then have become a question of law, and it could have reversed the judgment on that ground. That they might have so found is evidenced by the dissent of Van Brunt, *P. J.*, of the Appellate Division, in the *Lewis case*, 40 App. Div., 343, 347, in the following language:

> "I do not concur in the prevailing opinion. It seems to me that the evidence entirely fails to show that the plaintiff has sustained any permanent damage by reason of the new erection upon which the railroad is now run. The structure existing at the

time of the change is shown to have been a greater *detriment to the* premises of the plaintiff than the present structure, and, consequently, no damages have been sustained."

The Lewis property was in the block between 114th and 115th Streets, immediately below the Muhlker property, and the evidence as to the damages was substantially similar to that in the case at bar.

In view, however, of the conclusion reached by the Court of Appeals as to the second proposition, that is, as to the extent and character of plaintiff's easements in Park Avenue, and as to the relation of defendants to the structure, it was not necessary for the Court of Appeals to consider the first question. The second question was one which it could examine and determine whether the decision of the Appellate Division was unanimous or not unanimous because it was a question of law to be determined upon facts conceded or not controverted. It determined this question in favor of defendants, and, since, with that determination, there could never be any recovery, not only reversed the judgment but dismissed the complaint.

The Court of Appeals, in reaching this conclusion, did not determine that plaintiff had no easements in Park Avenue; it did not determine that such easements as he had are not property; it did determine that no easements to which he was entitled had been appropriated, taken or interfered with by the defendants. Whether plaintiff had any claims which he could enforce against the State which directed and made the improvement, or against the City, for whose benefit the improvement had been made, it did not determine, for neither the State nor the City was a party to the action.

It seems to defendants that this was purely a determination as to the quantity and extent of the property of plaintiff, as to the rights of the defendants, and as to the

reserved powers of the Legislature, questions of local law solely within the jurisdiction of the State Court.

The situation may well be compared to a case wherein the plaintiff claims that he is the owner of a parcel of land of defined location and dimensions; that a railroad constructed, not in a public street, but upon land acquired in fee for that purpose, has physically encroached upon his land to his damage. The location and dimensions of his land depend upon the legal construction to be given to his deeds and other muniments of title. The trial court finds, in accordance with his contention as to the location and dimensions of his land, that there is, therefore, physical encroachment to his damage in a certain amount. The Railroad Company, having contended that all of its structures were upon its own land, the Court of Appeals determines that the trial court was in error as to its interpretation of the deeds and other muniments of title, and that upon a true legal construction thereof there is no encroachment, and therefore no actionable injury, and thereupon reverses the judgment and dismisses the complaint. It may very well have been that the consequential damage suffered by the plaintiff in such a case would be substantial, but it is well settled law in New York that there could have been no recovery, and whatever he might have said in the Court of Appeals in respect to the Federal Constitution it certainly would not be contended that he could bring to this Court any Federal question for review.

Without, in any manner, losing sight of the fact that it is immaterial in this Court whether the *judgment* of the Court of Appeals was right or wrong as to the character or extent of the plaintiff's easements, we shall pause to consider what conceded or uncontroverted facts it had upon which to base its judgment.

As we have already shown, the real question at issue was whether plaintiff's easements in Park Avenue were of

the same unlimited character and extent as the easements of abutters on Third and Sixth Avenues; in other words, was Park Avenue and the railroad structures therein to be distinguished from Third and Sixth Avenues and the elevated structures in those Avenues?

That there were certain very marked differences in the origin and history of these Avenues cannot be disputed. The Avenues in respect to which the elevated railroad litigation originated were actually opened, regulated, graded and paved, and in use as public streets long before the incorporation of the elevated railroad companies, and without reference to any railroad occupation. The easements appurtenant to abutting property had been created and at the date of the alleged trespass existed, unburdened with any railroad rights. The elevated companies entered upon these Avenues of their own volition and for their own profit, without claiming to have acquired any rights from abutting owners. They denied that whatever easements abutting owners had in such Avenues were property rights. They did not enter under any legal mandate. The most that they claimed—and all that they claimed—was legislative and municipal authority. Park Avenue, on the other hand, did not become a public street, in fact or in law, until more than twenty years after the incorporation of The New York and Harlem Railroad Company, and not until nearly twenty years after the construction of the railroad. It was then created a public street in only a partial and restricted sense. It has been held, over and over again, by the New York State Courts, that it was created subject to the right of the Railroad Company to maintain and operate its railroad therein, and the central portion never became a public street, in fact, until after the improvements under the Act of 1892. Nevertheless, abutters have always, since the conclusion of the street opening proceeding in 1853, had and now have an open street not

less than forty feet in width in front of their premises, not encumbered by any railroad structure whatsoever.

In 1831 the Legislature of the State, which had, by the Statute of 1807, authorized the map of 1811, and by the Statute of 1813 conferred upon the City power to open streets under the right of eminent domain, chartered The New York and Harlem Railroad Company. By that charter, it authorized the Company to locate its road in any avenue, opened or *unopened*, within certain limits, upon complying with certain formalities and upon obtaining the consent of the City. The formalities being complied with and the road located in Park Avenue, then unopened, with the consent of the City, embodied in the agreement of 1832, that location became a statutory location.

All proceedings taken thereafter in reference to the creation of Park Avenue as a public street were necessarily modified by these acts of the Legislature, of the City and of the Railroad Company.

The railroad having thus been located along the *unopened* avenue, the railroad company next went to the owners, or supposed owners, of the land within the lines of the avenue and of the land bounded thereby. It obtained deeds, substantially all of which were identical in form. Two of them, one from Peter Poillon and one from Benjamin L. Benson, are in evidence in this case. The land described in these deeds extended, in the one case northerly and in the other southerly from Harlem Lane and McGown's pass. The land described in the deed from Poillon extended northerly to about 121st street, and that from Benson southerly to about 106th street. It seems that up to a time shortly prior to the incorporation of the New York and Harlem Railroad Company these lands had been farming lands, and Benson, Poillon, McGown and others were the well-known owners of these farms. On the trial of this case, how-

ever, it appeared that some of these owners, prior to giving deeds to the railroad company, had executed instruments of cession to the City of the 100-ft. strip laid out on the map of 1811 as Park Avenue. This fact would not have affected the railroad company's rights under these deeds as against abutters if these grantors had, at the time of the giving of such deeds, been the sole owners of the abutting lots. It appears, however, in the case at bar, and it is a fact in some other cases, that these grantors had, prior to the giving of the deeds to the railroad company, sold some of the abutting lots. It does not appear in the case at bar to what extent Poillon and Benson were the owners of lots fronting or abutting on the avenue as then mapped, but it is a fact that they were the owners of some of the abutting lands.

The railroad company entered into possession under these deeds, claiming title in fee to the central 24-foot strip, with further rights for slopes and embankments. These deeds were identical in form with that in the *Conabeer* case, to which judicial construction was given both by the Court of Appeals and by the General Term. In the latter court (84 Hun, 34), at page 38, Follet, *J.*, writing the opinion which was concurred in by both Presiding Justice Van Brunt and Associate Justice Parker, says:

> "By the deed of January 18, 1832, Mrs. McGown, the former owner of the fee of the plaintiff's lot, conveyed to the New York and Harlem Railroad Company a strip of land twenty-four feet wide in the center of the avenue and extending from Ninety-seventh Street to One hundred and sixth Street. By the terms of this deed the grantee was authorized to construct a railroad on the land conveyed, with the right of extending the embankment on which the rails were to be laid to the exterior lines of the avenue. At the date of this conveyance the avenue was 100 feet wide, and on each side of the land conveyed and within the avenue there was a strip of

land thirty-eight feet wide, the title to which was not conveyed, *but the right to cover these strips with an embankment was expressly granted.* The embankment as now constructed is fifty-six feet wide, covering the land conveyed by Mrs. McGown and a strip sixteen feet wide on each side of the strip granted by her, which is *twenty-two feet less on each side of the strip conveyed than the defendants by the grant were authorized to use.* By the conveyance the grantee was authorized to construct a railroad on the subject of the grant, and if necessary, to occupy the whole width of the avenue adjacent to the grantor's remaining land. The grant of the right to construct a railroad carried with it the right to operate it when constructed, and the defendants could not have been held liable to Mrs. McGown for incidental damages caused to her remaining property by operating the road, without showing that the road was improperly constructed or negligently operated. The plaintiff stands in the shoes of her predecessor in title, and has no greater rights than she had. There is no assertion that the road was improperly constructed. On the contrary, the proof is that it was built in accordance with the statute of 1872, and the requirements of the city authorities, and it is not alleged or proved that the defendants have been negligent in the operation of the road."

Upon this construction of these deeds the evidence in the case at bar would have justified a finding that as against plaintiff defendants had acquired by possession adverse to the plaintiff, such rights as, independent of all other questions in the case, would have wholly defeated the plaintiff in this action.

The railroad being constructed in the central portion of this inchoate street, it was soon realized that, by reason thereof, the Avenue should be so widened as to provide for unobstructed streets for ordinary travel on each side of the railroad.

As a matter of fact, the Act of 1837 was enacted

upon the petition presented to the Common Council of the City and upon the application of the City to the Legislature. Although this petition is not in evidence in this case, it has been in evidence in a number of these cases, as appears by the statement of case in the *Conabeer case*, 156 N. Y., 474–478:

> "In 1835, the matter of widening Fourth avenue from one hundred to one hundred and forty feet was brought before the common council by a petition requesting that the avenue be thus widened. One, if not the chief, ground upon which this was asked was the existence of the railroad in the center of that avenue."

The next step in the history of Park Avenue is the street opening proceedings, commenced in 1850 and consummated in 1853. The learned Judge who wrote the opinion in the *Conabeer case* refers to this proceeding as follows (at page 486):

> "When this street was opened, the municipality assumed to acquire the title of the New York and Harlem Railroad Company to the property which it owned in Fourth Avenue, awarding it therefor the nominal sum of one dollar upon each lot. At that time, however, the municipal authorities and the legislature recognized the right of the railroad company to continue its road in the street and in no way disturbed its possession or the exercise of that right. * * * When the street was opened in 1853, the railroad was upon a high viaduct along the center of the avenue, which was in the sole and exclusive possession of the railroad, and no portion of it was occupied as a public street."

The property owned by Conabeer was at or near 104th Street. In front of her property the Railroad Company had constructed its road, having obtained from McGown the deed, construed in the *Conabeer case*, identical in form with that of the Benson and Poillon deeds, in evidence in the case at bar, and the fact that McGown had good title

and conveyed good title to the Railroad Company by said deed was not questioned.

Prior to the street opening proceedings initiated in 1850 and consummated in 1853, so far as the record shows, the City had taken no step whatsoever to create or accept Park Avenue as a public street, in any sense whatsoever. Whatever steps it then took, or whatsoever steps it has since taken in that direction, must be construed with reference to all of the acts of the Legislature and of the municipality, both with respect to the avenue and to The New York and Harlem Railroad Company, including the charter of the Company, the agreement with the municipality, of 1832, and the widening act of 1837. The effect of these acts and agreements, taken in connection with the practical construction given by the City to the effect of its proceedings in opening the street, in leaving the railroad in its statutory location as hereinbefore described; the railroad and structures as then existing and being used and operated being wholly inconsistent with street use, must surely have affected the character and extent of this avenue as a public street and the easements of abutting property owners. The railroad was there and occupied the central portion of the avenue. It was left there. Its use was a public use. In accepting or creating a public street or streets out of the 140-foot strip laid out on the map as Park Avenue, the City in no manner attempted to destroy the prior public use. Whatever easements of abutters came into existence upon or by virtue of opening the avenue as a public street came into existence subject to these railroad rights. Under the general rule that property already devoted to one public use cannot be taken, under general laws, for another public use, where the effect would be to extinguish the franchises, the City could not have acquired the right of The New York & Harlem Railroad Company to maintain and operate its railroad in

Park Avenue, under the general language of the Act of 1813. The situation was very similar to that in the case of the *Suburban Rapid Transit Co.* v. *Mayor*, 128 N. Y., whereof Judge Gray (at p. 523) says:

> "In the absence of express language, no implication of an intention to supersede the prior devotion to the public use of the plaintiff's railroad can be predicated upon the general terms of an act which does not require such by reason of some inherent necessity or for the attainment of an object not otherwise to be effected."

In that case the City had assumed to acquire, for park purposes, certain lands, including land which had already been acquired by the Transit Company for a roadway, but, although the lands sought to be asquired for park purposes were specifically described in an act of the Legislature, it was held that they were acquired subject to the right to maintain and operate the railroad.

We think that what we have already said sufficiently shows that the plaintiff's contention that this case is governed by the peculiar and wholly exceptional rule laid down by the New York State Courts in the Elevated Railroad cases cannot be sustained; that there must, of necessity, be a very marked and material difference between the rights of abutters in and over streets laid out and opened, unencumbered by any railroad rights or burdens, and abutters' easements on Park Avenue, opened, so far as it ever was, in the manner hereinbefore described.

The easements of abutting owners in New York City streets are aptly described by Judge Peckham in the *White case* (139 N. Y., 19, 25):

> "The easements of abutting owners in New York City, who are without title to any portion of the streets upon which their lands abut, differ somewhat in their origin from ordinary easements. They have not been created by grant or covenant, but

it is said of them that it is easier to realize their existence than to trace their origin; that they arise from the situation, the course of legislation, the trust created by statute, the acting upon the faith of public pledges and upon a contract between the public and the property owner, implied from all the circumstances, that the street shall be kept open as a public street, and shall not be devoted to other and inconsistent uses."

The history of Park Avenue has been different from the history of the avenues considered in the Elevated Railway decisions. The "situation," the "course of legislation," and action taken "upon the faith of public pledges" have all been different.

Such easements as are now appurtenant to property abutting on Park Avenue differed "in their origin" from the easements appurtenant to property abutting on other avenues in the city.

In their inception and creation they were modified by all the legislative and municipal acts which had gone before, and at the very moment in which they came into existence they were met by the fact that the title or right to the central part of the new avenue had theretofore been acquired by the railroad company; by the physical fact that the railroad was constructed and was being maintained and operated thereon; and also by all the potential rights and obligations of the railroad company under and by virtue of the acts of the legislature and of the municipality.

It was the legislative and municipal intent and purpose of the entire transaction that the 140-foot strip should be devoted to two public purposes, viz., railroad and street purposes (Suburban R. T. Co. *v.* Mayor, 128 N. Y. 510, 521).

Under the rights reserved to the legislature, the corporate life of The New York and Harlem Railroad Company might be terminated, the grade, the number of

tracks, the form of structure and method of operation might be altered, changed or modified, under the contract with the City, various changes might be enforced in the public interest, but the *franchise granted* to maintain and operate its railroad was property and could not be taken by either, excepting only by the exercise of the right of eminent domain, either by the State directly or by special authority conferred upon the municipality, and upon making compensation therefor (People *v.* O'Brien, 111 N. Y. 1).

The reserved right to require extensive alterations and modifications has been, at least, twice exercised; once in 1872 and once in 1892. Those commanded by the Act of 1872 were partly for the benefit of the railroad and partly for the benefit of the municipality. Those commanded by the Act of 1892 were wholly for the benefit of the public. There is no suggestion, in this case, that the Act of 1872 was not a valid exercise of the reserved power of the legislature.

The avenue having thus been opened to such extent as it was ever opened within the 140-foot lines designated by the Act of 1837, some twenty years after the location and construction of the railroad, leaving the railroad in the exclusive use and occupation of the central portion, actual street use was limited to the two strips of land, some 40 feet in width, on each side of the railroad. The Railroad Company was, therefore, left in its original location, and subject to the power of the Legislature, reserved in its charter (Section 18, Chapter 263, l. 1831) to "at any time alter, amend, modify or repeal" its charter; and subject, also, to the drastic reservations and conditions contained in the agreement of 1832 with the City.

In addition to the power reserved by the Act of 1831 to itself, the Legislature by the Act of 1872 asserted its undoubted province and power to exercise the rights reserved to the Municipality, and in such exercise thereof

directed the manner and form in which the railroad should be constructed in order to improve and regulate the use of the avenue. This was primarily a grade crossing act, the purpose expressed in the act being "for "the purpose of rendering the same safe and convenient "to any persons crossing the same, and the railroad "trains and passengers traveling thereon," was in the interest both of the Railroad Company and the municipality, and the expense thereof—some six millions—was borne equally by each. The form in which the act directed that the railroad should be constructed not only physically precluded the use of the central portion of about 60 feet for any street or highway purposes, but the act in terms provided that this central portion should be devoted exclusively to railroad purposes:

> "That the 'tunnel and railways shall be exclusively for the uses and purposes of said railroad company,' and it is made unlawful for any person other than a public officer, in the execution of his duty as such, 'to enter or pass upon or through the same, or any portion thereof, on foot or in any other way than in the proper cars of this corporation provided for that purpose.'" (101 N.Y., 327, quoting Section 9, Chapter 702, Laws of 1872.)

This Act of 1872 was a drastic instance of the exercise by the Legislature, not only of its reserved power in respect to The New York and Harlem Railroad Company, but in respect to this avenue, opened under the peculiar circumstances and conditions hereinbefore set forth. It attempted to, and did, deal with both subjects, on the theory that it had a right so to do, for the purpose of a public improvement, and upon the theory that its powers were in no manner restricted or curtailed by any rights or easements which abutting property owners had acquired in the avenue.

It will be noted that the Act of 1872 authorized and

directed the Railroad Company to make the improvements. Under the Act of 1892, here complained of, the Legislature, evidently regarding the improvement to be made as of a wholly public character, still further took the matter into its own hands by creating a board under whose direction and supervision the work should be carried out, in the interest of the public (including this plaintiff), to be benefited thereby.

The moving cause of the enactment of the law of 1892 was the act of Congress of 1890, requiring the raising of the bridge by means of which the railroad crosses the Harlem River. While it is not in evidence in this case, it is a fact, and appears in other of these Park Avenue cases, that a bill was introduced into the Legislature of the State of New York, the purpose of which was to authorize the change of grade of the railroad as fixed and established under the Act of 1872, to such extent only as was necessary in order to enable it to comply with the act of Congress. As appears in plaintiff's brief, and as a matter of fact, it was only necessary, for this purpose, to change the grade as far south as 125th Street. This bill passed both houses of the Legislature, but certain property owners (we cannot say that these included the plaintiff) objected to this bill, with the result that the bill failed to receive Executive approval. The demand of the property owners was that the entire avenue, south of 125th Street, should be opened up, and, in response to that demand, the Act of 1892 was enacted in the form in which it was, under which, not only without any benefit whatever to the Railroad Company but to its actual damage, its road was taken from the easy grade and solid earth roadbed provided under the Act of 1872, where it was economically maintained, free from grade crossings or other obstructions, and placed upon the present elevated structure, with steep grades and subject to expensive maintenance.

The situation immediately prior to 1892 is tersely described by Presiding Justice Van Brunt in *Tocci* v. *Mayor*, 73 Hun, 46, 51:

> "These railroad companies were in exclusive occupation of a part of the public streets of the City of New York. It was deemed by the Legislature advantageous to the City of New York that such occupation should cease, and that these portions of the streets should be restored to public use, and that the interruption of communication between the two sides of the City should terminate. * * * It is entirely immaterial in the consideration of this question whether the railroad company owned the fee of the land which they occupied or not. For all practical purposes they were its absolute owners, and entitled to its absolute control and exclusive use for the purposes of their railroads."

That the situation prior to the improvement made under the Act of 1892 was more satisfactory to the Railroad Company than that created by that improvement is evidenced not only by the physical facts but by all the expressions of the Court upon this feature of the litigation. The fact has also been directly in evidence in several of these cases which have been tried. In the *Fries case*, Ezra B. Naylor, an Assistant Engineer in the employ of the Railroad Company, testified as follows:

> "I am familiar with the requirements of the act of Congress, requiring the bridge over the Harlem River to be raised to a height of 24 feet above mean Spring tide. I know there was such an act passed. I prepared a plan to carry the railroad over such a bridge. To do that, it was necessary to change the grade, beginning at 125th Street and going northerly. That would have been sufficient for all railroad purposes." (See p. 154 of the Record in the *Fries case*, 165 N. Y., 270.)

In the *Lewis case*, Walter Katte, Chief Engineer of the Railroad Company, testified as follows:

> "I am familiar with the provisions of the Act of

Congress just put in evidence, which required the bridge over the Harlem River, used by The New York Central and Hudson River Railroad Company, to be raised 24 feet above the mean Spring tide. At the time of the passage of that Act of Congress in 1890, the grade of the railroad of the defendants was fixed by Chapter 702 of the Laws of 1872. The railroad companies, of themselves, had no right to change that grade. After the passage of this Act of Congress, which also provided that the change need not be made until the necessary State legislation should be had, I was called upon by The New York Central & Hudson River Railroad Company to prepare plans as to the method of complying with the Act of Congress, and I made investigations and prepared plans accordingly."

"Q. In order to comply with the Act of Congress, how far south of the Harlem River was it neccessary to change the then existing grade of the railroad?

"*Plaintiff's Counsel:* We object to that unless it is shown that those plans were carried out in the present construction. We object to any evidence of any plans that were not carried out and executed.

"Objection overruled. Exception to plaintiff.

"A. To 125th Street.

"There was no necessity whatever on the part of the railroad company, in order to comply with the Act of Congress, to change its grade any farther south. There was no necessity, for any railroad purposes, of changing its grade south of 125th Street. The four tracks which have been constructed under the Fourth Avenue Improvement of 1872 were entirely satisfactory to each of the railroad companies.

"Q. Was any attempt made to carry out these first plans of changing the grade south of 125th Street only, by preparing an act or otherwise?

Plaintiff's Counsel: We object to any evidence as to any attempt.

Objection overruled. Exception.

"A. An act was prepared and passed by the Legislature, but not signed by the Governor.

"Q. Who objected to the plans? A. Local interests and property owners." (See pp. 73 and 74 of the Record in the *Lewis case*, 162 N. Y., 202.)

The whole plan of the improvement, therefore, was in aid, not of the Railroad Company, but in aid of public improvements; first, in aid of the construction of the Harlem River ship canal by the Congress; and secondly, and so far as it related to the territory south of 125th Street, was for the improvement of the avenue and municipal benefit. South of 125th Street, prior to the improvement of 1892, and under the old improvement of 1872, many cross streets, including 115th Street, upon which plaintiff's premises front, were obstructed—that is, they stopped there and were cut off by the railroad structure. There were no means of access from one side of the street to the other at any point between the blocks, and only a few cross streets were carried over by bridges; so that there was a substantial interruption of traffic between that portion of the City lying to the easterly and that lying to the westerly of Park Avenue. Under the improvement of 1892, the solid earth and stone embankment from 111th Street northerly to a point opposite the plaintiff's premises was entirely removed. North of that point the cut was filled up and the space theretofore occupied by the solid embankment and by the cut, paved over, and became usable as a public street, giving the property owners direct and unobstructed access from one side of the avenue to the other.

One word upon the mandatory character of the Act of 1892: It is not claimed by the defendants that if plaintiff had sustained his contention that any of his *property* had been taken, that he could have been denied the right to compensation from someone, by reason of the mandatory character of the act. The fact, however, that the act not merely authorized but directed the specific improvement to be made, is a factor, and an important and material

factor, in the determination of the whole controversy. In the first place, it gives character to the entire improvement as a public improvement, and not merely one which the Legislature authorized the railroad company to carry out in case it should determine that it would be for its own interest to do so. Improvement was to be made without reference to the benefit to the Railway Company, but to its disadvantage. Secondly, the mandatory character of the act is important and material, in that it was an exercise, by the State, of its control over the streets of New York generally, and particularly over this avenue, under the circumstances under which it was opened. That such control is absolute, so far as the trusts upon which such streets are held by the City of New York are concerned, is well established (People *v.* Kerr, 27 N. Y., 128).

We have thus, at some length, stated the facts which were presented to the Court of Appeals and upon which that court was asked to determine the character and extent of the rights of plaintiff and defendants, respectively, the character of the improvement, and the powers of the Legislature in respect thereto. We think they are sufficient to show that that court, after long and very mature deliberation, decided the case justly and right.

The State Court had before it the question of defendants' claim of title, adverse to plaintiff and his predecessors in title, under the Benson and Poillon deeds; the more than sixty years of possession, occupation and use, also adverse, by the Railroad Campany; the extent to which Park Avenue had been opened; the character and extent of plaintiff's easements in aud over the avenue; the effect of all the acts and proceedings, both of the Legislature and of the municipality, in respect to the avenue and to the Railroad Company; and, finally, it had before it the open question as to whether, upon the whole case, plaintiff had or had not suffered any actual damage.

We respectfully submit that the determination of the court of last resort was a determination with respect to local property law, exclusively within its jurisdiction.

Plaintiff now asserts that he has rights under certain contracts—the deed of cession from Poillon to the City, and the deed from Poillon to plaintiff's predecessor in title. Assuming that, as between Poillon and plaintiff's predecessor in title, there was a contract, the full force and effect of which was, as claimed by plaintiff, viz., that the 100-foot strip designated as Park Avenue on the map should be forever kept open and wholly unobstructed (which we do not admit), was it not open and competent to the State Court, under the evidence in this case, to determine whether such contract rights were held and possessed, in their full force and integrity, by this plaintiff in 1892? Or that such contract rights have been legally lost, modified or curtailed? Poillon repudiated such contract rights when he executed and delivered the deed to The New York and Harlem Railroad Company, more than sixty years ago; the City repudiated any such contract rights when it entered into the agreement of 1832 with the Railroad Company; and the Railroad Company denied any such contract rights when it entered into possession under the Benson and Poillon deeds and the agreement of 1832, and constructed its railroad.

Plaintiff now further asserts that he has certain contract rights, subsisting between the parties to this action, by virtue of the fact that both claim under Poillon as a common source of title. The remarks of the foregoing paragraph apply with equal force to this alleged contract. Further, while he makes this claim in one breath, in respect to his contract rights, in the next he asserts that the deed from Poillon to the railroad company was wholly void. If it was wholly void, then plaintiffs can claim no contract rights under it. If it was not void, as defend-

ants claim, it served as a color of title upon which to found adverse possession.

Plaintiff now further asserts that he has a contract, arising out of the decision of the State courts in the elevated railroad cases, made prior to the purchase, by plaintiff, of his property on Park Avenue. This he alleges arises by virtue of the decision of that court in the elevated cases, determining that the easements appurtenant to property abutting on streets or avenues in the City of New York, opened under the Act of 1813, were property and could not be taken without compensation (Plaintiff's Brief, pp. 30, 31). There is, however, in this case no evidence whatsoever that that portion of Park Avenue upon which the structures complained of are situated was opened under the Act of 1813. On the contrary, plaintiff, in respect to the street-opening proceedings, expressly demanded and had a stipulation to the effect that these street-opening proceedings were introduced in evidence simply to show the widening from 100 to 140 feet (Record, p. 34).

Plaintiff now also asserts that he has been deprived of his property without due process of law. Did he not have his day in court? Did he not have a full opportunity to be heard and to present his propositions of law and his evidence? That he had such opportunity is conclusively shown by the fact that he recovered a judgment in the court of original jurisdiction. He chose his own forum and form of action, bringing his suit in equity in the Supreme Court of the State of New York. In the State of New York compensation for property taken or to be taken by a corporation having authority to exercise the right of eminent domain is ascertained in one of two methods, different in form of procedure, but not at all in substance:

In the one, the corporation desiring to acquire property which it does not claim to own, initiates a proceed-

ing under the Condemnation Law, in accordance with the provisions of which Commissioners of Appraisal are appointed, who determine the amount of compensation to be paid.

In the other, the owner—or alleged owner—claiming that his property has been taken, initiates a proceeding, and becomes a plaintiff in an action in equity; in form, demanding an injunction and, as an alternative, money damages, past and future; in substance, the action is brought to ascertain the amount of compensation. The one is brought when the corporation admits that it requires the property of another; the other is brought when the owner—or the alleged owner—asserts that his property is taken, and that fact is denied by the corporation. The case at bar is of this latter character.

At the trial in the court of original jurisdiction, the plaintiff asserted that, being the owner of that lot abutting on Park Avenue, as appurtenant to such lot, he had certain rights and easements in Park Avenue, and that defendants had trespassed upon—that is, *taken* the said easements, or some of them.

Defendants denied that they had trespassed upon or taken any easements or property of any kind, owned by plaintiff.

In the Special Term of the Supreme Court, after a full and fair trial, plaintiff was successful so far as the structure erected under the Act of 1892 was concerned. Both parties appealed to the Appellate Division of the Supreme Court, and in that court the plaintiff sought to sustain the judgment, except that he claimed he had not been given relief to as full extent as he was entitled. The defendants sought to overthrow the judgment. After full argument in that court, the judgment was affirmed.

After full argument in the Court of Appeals, that Court decided, as a matter of law, upon conceded or uncontroverted facts, that none of the easements or property of

the plaintiff had been trespassed upon or taken by the defendants, reversed the judgment in all respects and dismissed the complaint.

We have hereunder called attention to the manner in which the case came to the Court of Appeals, and to the jurisdiction of the Court of Appeals in respect thereto.

We now come to the question, raised by the plaintiff for the first time in the Court of Appeals, that the Act of 1892 is unconstitutional.

Our position is that the constitutional question not only was not raised by the pleadings, but, in the very nature of the case, it could not have been raised in this form of action; that, as a matter of fact, it was not even suggested until reaching the Court of Appeals, and that it was then an afterthought which came after the decision in the *Fries case*, which involved disaster to plaintiff, on the issue which he had tendered in the lower courts

We shall, however, assume that as a matter of practice plaintiff is properly in this court. Whether he is or not, it would not be of advantage to defendants to have it here held that, on any technical question, the plaintiff is not properly in this court. As has already been stated, there are many other actions of this same character, and we are content that this case be decided on whatever merit there may be in plaintiff's contention.

Chapter 339 of the laws of New York of 1892 does not take the plaintiff's property without due process of law within the meaning of the Fourteenth Amendment.

1. The statute, read in connection with the charter of the Harlem company, provides for compensation, therefore due process of law.

It will be observed that this action is against the New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company—*no one else*—and the claim is that *those companies* have taken plaintiff's easements of light and air, &c., and judgment of injunction is prayed against *them* only.

Chapter 339 Laws 1892 *commands* those companies to place the Harlem Company's railroad upon the structure erected by the State, and to run the trains upon it.

Section 8 of the charter of the Harlem Company (chapter 263, Laws 1831, Supp. to Brief, p. 8) provides, in the usual way, for the *taking* by that company, by condemnation, of "lands and real estate," upon compensation, of course. The words "real estate" in New York include easements. They are the only words used in the "general railroad act" and the act under which the elevated railroads were built. The Railroad Law of New York, which now applies to all railroad companies in the State, uses (§ 7) the words "real property or of any right, "interest or easement therein," and by the Condemnation Law payment is regulated in advance (Code of Civil Procedure, §§ 3357–3373). Read in connection with the charter of the Harlem Company and the Railroad Law, Chapter 339 of the laws of 1892 of New York provides for compensation for the taking of all real estate and is constitutional.

Adirondack Railway Co. *vs.* New York State, 176 U. S., 335.

Section 3359 of the Code provides that "*whenever* any person is authorized to acquire title to real property for public use by condemnation, the proceeding for that purpose shall be taken in the manner prescribed in this title." Section 7 of the Railroad Law provides, among other things, that if a railroad company is unable to agree for the purchase of any real property, or of any right, interest or easement therein, required for the purpose of its incorporation, it shall have the right, "where its railroad shall be lawfully in possession of a lessee, mortgagee, trustee or receiver, and additional real property shall be required for the purpose of running or operating said railroad," to acquire such real property by condemnation. This was the law at the time of the enactment of Chapter 339 of the Laws of 1892. It is, therefore, perfectly apparent that if these defendants have taken or if they require any of plaintiff's property, for the purpose of operating the road, there is ample authority to acquire such property by condemnation, and it was not at all necessary to insert any of these various provisions, or any reference to them, in the Act of 1892. They must be read together.

Under the *Dolan case* (175 N. Y., 367, Supplement to defendants' brief, 111), and also the *Ketcham case* (177 N. Y., 247, Supplement to defendants' brief, 113), the Court of Appeals, having determined that for any property taken for station purposes, outside of the steel viaduct, the defendants are liable to compensate the plaintiff, it is now open to the defendants to either have the compensation ascertained in the actions already brought, or to have it determined under the Condemnation Law.

If express provision had been made in the Act of 1892, that compensation should be made for all *property* taken or required for the purposes of the improvement, either by purchase or by condemnation, this plaintiff would then have been met with the same question with which he is

met in this case. No provision in the Act of 1892 would have aided him except a provision that compensation for all *consequential damages* to private property, caused by the making of the improvement, should be made, and should be determined either by agreement or by condemnation.

The jurisdiction of this court entitles it to review the action and judgment of the state court upon any and every question wherein the judgment of the state court shall be found by this court to have involved questions arising upon the inhibitions of the federal constitution upon which the records shows the plaintiff in error here to have relied and insisted in the state court. The jurisdiction of the state court in these particulars involved the consideration and determination of the questions of violation of inhibitions of the federal constitution in so far as they appear upon the record to have been raised in the state court, and were in fact involved in the issues which the case presented for determination and adjudication. The case alleged in plaintiff's complaint is destitute of any allegation that the acts of the defendant railroad companies transcended in any respect their charter powers, or that the railroad companies were in any wise wanting or lacking in the charter powers requisite for the doing of the things complained of, or for acquiring whatsoever property right was requisite unto the lawful doing of those things as against plaintiff. Without specifically so alleging in so many words, the complaint assumes that the defendant railroad companies had the charter right and power to acquire from plaintiff, upon compensation, whatsoever property or property right of his, if any, was requisite unto the rightful maintenance and operation, as against him, of the railroad upon and with the structure described in his complaint. In consonance with that theory of the complaint was the prayer thereof

"that the defendants be enjoined," etc.,

"or that the court shall determine the amount

of damages to the fee value of said premises in consequence of the appropriation by defendant of plaintiff's said easements, as aforesaid, amounting," etc. "and that unless the defendants shall forthwith pay the same to the plaintiff the defendants be enjoined from using the said elevated railway structure and depression, and from continuing the same opposite said premises."

The answer of the defendants contained nothing antagonistic to this theory of the charter powers of the defendant which the complaint in manner aforesaid assumed. The defendants did not at any stage of the case, or in any court, either directly or indirectly, set up any claim to the effect that if the structure and its use, or either thereof, should be found to take or invade any property or property right of the plaintiff, that the defendants could not be held answerable to compensate for the property or property rights so taken or invaded; hence if by any possibility any question might or could have been made, either by reason of absence of provision for compensation in chapter 339 of the laws of 1892, or upon any other ground whatsoever, regarding the sufficiency or adequacy of remedy in plaintiff's favor available to him whereby to recover such compensation, no state court was asked to determine such question, and the record is barren of any indication that it undertook or assumed to do so. The pure, simple and sole ground upon which the plaintiff was defeated by the judgment of the Court of Appeals of the State was that all of the things of which plaintiff complained, and by which the proof tended to show that he had suffered loss and damage, were within the rights which the state, the municipality and the railroad had acquired as against plaintiff's predecessors in title, and plaintiff; that no property of his had been taken, that no property right of his had been invaded, and hence that in so far as, if at all, plaintiff had suffered loss or damage consequent upon the acts of which

he complained, such loss or damage was not accompanied by nor consequent upon any legal wrong, and hence was within and governed by the doctrine of *damnum absque injuria*. Obviously, then, it is an indispensable prerequisite to jurisdiction of the question as to whether chapter 339 of the laws of 1892 constitutes, as against plaintiff, a violation of the inhibitions of the federal constitution in the particulars asserted by him, that a court possessing the jurisdiction so to do, and whose jurisdiction is in that behalf invoked, shall first adjudge that the Court of Appeals of the State of New York committed error in reaching the conclusion and judgment that plaintiff's property had not been taken, and his property rights had not been invaded by that enactment, or by action taken and had under and in pursuance of its authority.

While not at all admitting that this court is possessed of jurisdiction, nor that its jurisdiction has been invoked in any competent method or way to determine that the state court erred in thus determining and adjudging against plaintiff in the particulars above specified, let it be assumed, for the sake of the argument, that such jurisdiction of this court is both possessed and invoked.

The questions to which we would be thus led are:

1. Is chapter 339 of the laws of 1892, as against plaintiff, violative of the inhibitions of the federal constitution, in that it provides for the taking of his property, or invasion of his property rights, without due process of law?

2. Is chapter 339 of the laws of 1892, as against plaintiff, violative of the inhibitions of the federal constitution in that it impairs the obligations of a contract, in and by depriving him of or diminishing the legal scope of his remedy or remedies to which he was entitled upon and in respect of such contract?

In so far as this enactment operated as or had the effect of an amendment or alteration of the charter of the Harlem Railroad Company, it is within the doctrine of *pari materia*, which suggests and requires that it be read in connection with the existing charter upon which such amendment is incorporated, and in connection with the General Railroad Law, the Condemnation Law, and the Code of Civil Procedure, wherein and whereby provision is made empowering the Harlem Company to take property for the purposes of its incorporation, and providing for notice of and hearing in an orderly proceeding preliminary to determination and adjudication of compensation for property and property rights to be for those purposes acquired and taken.

Sections 8 and 9 of the charter of the Harlem Company, shown upon pages 3 to 5 of the supplement to brief of defendants in error, provide the charter power applicable for the acquirement of property requisite for the corporate purposes, and when by chapter 339 of the laws of 1892 these charter powers or obligations were, if they were, enlarged so that they transcended the scope of the property right which the company then possessed, there can be no question that this authority for the acquirement of property was in like manner enlarged and extended, and thus constituted that plain and adequate method and remedy which constitutes due process of law.

Moreover, the Railroad Law of New York, chapter 39 of the General Laws, is applicable to the Harlem Railroad Company as to all other railroad corporations of the State, as are also the provisions of the Code of Civil Procedure, sections 3357 to 3371 prescribing the orderly method of notice and hearing as the basis of orderly determination and judgment.

The original brief of the defendants in error, at pages 20 to 22, sets forth quite at length quotations from the adjudications of the Court of Appeals of the State of New

York, showing that the proceeding which plaintiff made choice of in this case is one well recognized by the courts of the state as suited to the administration of and wherein they do administer the law in such wise as by and resultant upon orderly hearing and determination, they adjudge the rights of those who in such method assert that their property rights have been taken, and invoke adjudication of compensation in respect thereof, the same principle of remedy and measure of remedy as would be accorded under the statutory proceeding above mentioned.

As has been stated above, plaintiff assumed this as the basis of his choice of method of procedure, and as the foundation thereof, and neither court nor counsel has at any stage or in any court in any wise questioned the soundness of plaintiff's assumption in this regard.

If upon any view of the record it can be said to show that plaintiff has established either that his property has been taken, or his property rights invaded, or he deprived of the benefit of any contract obligation, whatsoever may have been the cause of his failure of obtaining a remedy and satisfaction in respect of such taking or invasion of his property or property rights, or deprivation of contract obligation rights, they have not, nor have any of them, resulted from any want of due process of law, or impairment of contract obligation.

We respectfully submit that the petition in error should be dismissed for want of jurisdiction, or that the judgment should be affirmed.

IRA A. PLACE,
Attorney for Defendants in Error.

THOMAS EMERY,
Of Counsel.

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PETITION FOR REHEARING.

Supreme Court of the United States

OCTOBER TERM, 1904.

No. 99.

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SUPREME COURT U

HENRY MUHLKER,

Plaintiff in Error,

vs.

THE NEW YORK AND HARLEM RAILROAD COMPANY AND THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Supreme Court of the United States.

HENRY MUHLKER,
Plaintiff-in-Error,

vs.

THE NEW YORK AND HARLEM RAILROAD COMPANY

and

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

October Term, 1904. No. 99.

TO THE SUPREME COURT OF THE UNITED STATES:

The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company do respectfully petition the Court that number ninety-nine of the present term be reheard—

upon the following grounds:

FIRST.—The Court has not yet been told that New York has passed an act by which she was to pay, through her Court of Claims, all "*damages alleged to have been caused to*," "*property abutting on Park avenue*," "*by the acts "and operations performed and carried out, pursuant "to" the act of 1892* by the Board created by that Act, except "damages for which any railroad corporation "or corporations may, either at law or in equity, be "liable."

The Court has held in *Chicago* v. *Taylor* (125 U. S., 161)—and several times since, that these words mean, among other things, *all* the lessening in the value of the property—which is exactly the thing for which the plaintiff in error has got a judgment, only much more completely so—since his judgment is for the lessening of the value which was caused *only* by the cutting off *of light and air* (R., 25)—whereas by this act New York pays for *all* damages.

And as by the railroad law and the Code of Civil Procedure of New York, the petitioners are bound to *pay* Mr. Muhlker for any "easement" of his which they take, the full amount of the damage which that taking may do to him, to be ascertained by a regular judgment of the Supreme Court of New York, which is New York's only court of *general* jurisdiction:—

The pertinent portions of the Railroad Law of the Code are quoted below and *perhaps* counsel can tell the Court *in what words* New York could "pass" "any" "law" which would less impair "the obligation of" "contracts" which Mr. Muhlker may suppose he has got, or which could more thoroughly provide for "due process of law" in the taking of any of his property.

That much of the railroad law and a considerable portion of the Code of Civil Procedure were not re-written into the act of 1892 will perhaps not give the Court much trouble. A word will be said of it later.

Of course, the only Federal question raised below was that *the Act of 1892* was unconstitutional (R, c).

The petitioners do respectfully submit that the effect of the Court's judgment is to compel *them* to pay not only what Sovereign New York has said they need not pay, *but what she has agreed to pay herself*, and for the paying of which she has provided an adequate source—namely, her own treasury, and it may be that this was what was meant by the Court of Appeals of New York,

when, speaking through its Chief Judge, and having just held that it was New York which had done the damage and which therefore ought to pay for it, said (R., 170): "Undoubtedly the State * * * has the power to "authorize ascertainment of the damages to the abutting "owners through its Court of Claims, and to provide for "their payment, *and it may be well that it would be equit-"able for it to do so.*"

Briefly, then, the petitioners do respectfully submit this. Assuming the broad principle that where *any body*, by the doing of *any thing*, for *the public*, is hurt in a money way, *he ought to be fully paid for it*,—in this case, New York *provided for that payment*, and perhaps in as little of a blundering way as is possible—under her form of government.

SECOND.—The *tremendous* character of the decision.

Never before has the Court held anything about the words in the Constitution, that no state shall "*pass any law*" "impairing the obligation of contracts," unless the case were about a *written law*—a *legislative* act or a *constitution*, and about *such* legislative acts, it has *twice* held that where there were *two* acts, the language of which was *similar* though not *identical*, the state court was not bound to give to the one the same construction which it had, before, given to the other.

Wood *v.* Brady, 150 U. S., 18, 22.
Bacon *v.* Texas, 163 U. S., 207, 226.

Here the state of things is this:

The *words* of Poillon's deed, under which Mr. Muhlker claims, were construed, by the Court of Appeals of New York in *Kerr's* case, *against* Mr. Muhlker's contention and in favor of the contention of the petitioners:

(*People* v. *Kerr*, 27 N. Y., 188.)

Then came the *Story* and *Lahr* cases, in which, in an entirely different contract, *similar* but not *identical*

words were construed another way. In this state of things Mr. Muhlker bought his land. *Now*, the State court in construing Muhlker's (Poillon's) deed, containing the identical words contained in the Kerr deed, and construing also the effect and extent of the rights acquired by the defendants and the acts of the Legislature and of the Municipality in respect thereto, holds against Muhlker; and it is this *decision* of the court of appeals of New York, which the Court, in the opinion, now holds to be a *law*, *passed* by New York, which impairs the obligation made by Mr. Muhlker's deeds—and not the act of 1892.

The petitioners respectfully submit that they can easily show that, under the doctrine of the prevailing opinion, *any* case of ejectment or simple trespass, and *any* case of *any* "contract" where the meaning of words is to be determined by the *Common Law* will come straight to the Court.

> Knox *v.* Exchange Bank, 12 Wall., 379, 383; quoted in Central Land Co. *v.* Laidley, 159 U. S., 103, 110.

THIRD.—It is said by Mr. Justice Holmes, in his opinion, that the Court is extending to the present case the principle of *Gelpcke* v. *Dubuque*.

In that case there was full jurisdiction because of the citizenship. In the later case of *Railroad Co.* v. *McClure*, (10 Wall., 511, 515), the *same* matter came to the Court by a writ of error bringing up the record of the Supreme Court of Iowa, in which case the writ of error was dismissed for the reason that the Court had no jurisdiction of the matter when it was brought up in that way, and in *Central Land Co.* v. *Laidley* (159 U. S., 103), the Court, speaking by Mr. Justice Harlan, and then, giving the history of those cases, said that decision was right. If that were so, of course *this* writ of error must be dismissed.

The petitioners, however, have no wish to succeed upon any such ground. If the Court, upon all the merits, says they *should* pay they will pay, and this matter is mentioned only in view of what has been said above as to the reading of the Act of 1892, together with the railroad act, and the Code. If the judgment is to go upon the ground that they are not all one law, then the petitioners would ask for the dismissal of the writ of error, because there would be still time to put all the acts into one, *besides* it is quite as well New York should know that, when she chooses to give a simple command to one of her creatures, she must print into it the most of her railroad law and a very considerable portion of her code of civil procedure.

And the petitioners do respectfully ask for the rehearing of this case, together with numbers 202 and 203, which present the same questions.

And as in duty bound will ever pray.

IRA A. PLACE,
THOMAS EMERY,
Of Counsel.

We certify that in our opinion the foregoing petition for rehearing is well founded.

IRA A. PLACE,
THOMAS EMERY,
Of Counsel.

We append the opinions, section 7 of the Railroad Law, section 3359 of the Code of Civil Procedure, the act above referred to and a few observations thereon, and respectfully ask for the reading thereof.

IRA A. PLACE,
THOMAS EMERY,
Of Counsel.

Observations on the Act of 1901.

The trial court found in this case that Mr. Muhlker's property had been lessened in value by "a continuous "trespass upon his easements of light and air," and gave judgment for the lessening in value of the premises "*solely* in consequence of *said* trespass (obstruction of "light and air) and aside from any other causes." (R. 25.)

That this obstruction of the light and air comes from the structure and *not* from the running of the trains, is apparent from the opinion of the court, and follows from the fact that the defendants had the *right* to run their trains. Both the *Story* and the *Lahr* cases had so held. *Fobes* v. *R. W. & O. Rd. Co.*, 121 N. Y. 505, 515).

But the structure was built by the State and not by the *defendants*. This the trial court *finds* as a fact (R. 24), and the Court of Appeals of New York so held, and reversed (R. 167, 170), holding that the change was for the benefit of the public *solely* and not at all for the benefit of the defendants, and that the *State* ought to pay.

By the General Railroad Act and the Code of Civil Procedure the defendants were required to *pay* for all "*easements*" which they took from anybody, and all other interests in real estate beside—to *pay before* the taking.

The state, by the Act of 1892, provided that the cost of constructing the viaduct and of making the physical changes in the avenue should be borne by the railroad company and by the city; by the Act of 1901 the state provided that there should be paid from its own treasury all damages caused to abutting property by "the acts and operations" of the board created by the act which the owners of the abutting property could not recover from the railroad companies.

With these statutes all before it the Court of Appeals held that the defendants were *not* liable and intimated that *the State ought to pay*.

In the Court of Appeals the plaintiff in error raised two Federal questions and but two, nor is any other raised anywhere in the record.

These two questions were that the *Act of 1892 is unconstitutional* because *first*, it does not provide for *notice*, and *secondly*, because it does not provide for *compensation* for the taking of these easements (R. 77, 78; Plaintiff's Brief, p. 11–12).

The court now holds, *not that the Act of 1892* is unconstitutional, but that *the decision of the Court of Appeals* is unconstitutional.

We respectfully submit that there can be no question and *no argument even* about the constitutionality of the act of 1892.

Through the Railroad Law and the Code of Civil Procedure it *compels* full notice and full payment by the companies for the taking of all and any "*easements*":—*these* easements, of course, if there be such as the plaintiff claims: and through the Act of 1901 it compels payment from the State's treasury "*for all damages*" which the property of the plaintiff may have suffered.

We respectfully submit that there is not any Federal question, and that the acts have provided for payment to Mr. Muhlker anyway.

ACT OF 1901.

CHAP. 729.

"AN ACT conferring jurisdiction upon the court of claims "to hear, audit, and determine the alleged claims of "certain owners of real property in New York city "for damages alleged to have been caused to said "property by the operations carried out pursuant to "chapter three hundred and thirty-nine of the laws "of eighteen hundred and ninety-two.

Became a law, May 11, 1901, with the approval of the Governor. Passed, three-fifths being present.

"The People of the State of New York, represented in "Senate and Assembly, do enact as follows:

"SECTION 1. Jurisdiction is hereby conferred upon the "court of claims to hear, audit, and determine the alleged "claims of persons who now own or heretofore have owned "real property abutting on Park avenue, in the Borough "of Manhattan, city of New York, between One Hundred "and Sixth street and the Harlem river, or the heirs, ex- "ecutors, administrators, or assigns of said persons, for "damages alleged to have been caused to said property by "the acts and operations performed and carried out, pur- "suant to chapter three hundred and thirty-nine of the "laws of eighteen hundred and ninety-two, and the acts "amendatory thereof and supplemental thereto, in so far "as said acts and operations were performed or carried "out by, or under the direction or superintendence of, the "public board created by said act, namely, the board for "the Park avenue improvement above One Hundred and "Sixth street, and the court of claims is authorized to "make awards and to render judgments therefor against "the state and in favor of said claimants; provided, how- "ever, that this act shall not be construed as conferring "upon the court of claims jurisdiction to award any dam- "ages for which any railroad corporation or corporations "may, either at law or in equity, be liable.

"SECTION 2. No award shall be made or judgment ren- "dered herein against the state unless the facts proved

" shall make out a case against the state, which would
" create a liability were the same established in evidence
" in a court of law or equity against an individual or cor-
" poration; and in case such liability shall be satisfactorily
" established, then the court of claims shall award to the
" claimants such sums as shall be just and equitable, and
" shall render judgments for the same, notwithstanding
" the lapse of time since the accruing of damages, pro-
" vided the said claims are filed with the court of claims
" within one year after the passage of this act.

" SECTION 3. This act shall take effect immediately."

Railroad Law of New York.

"ACQUISITION OF TITLE TO REAL PROPERTY.

"§ 7. All real property, required by any railroad corporation for the purpose of its incorporation, shall be deemed to be required for a public use. If the corporation is unable to agree for the purchase of any real property, or of any right, interest or *easement* therein, required for such purpose, or if the owner thereof shall be incapable of selling the same, or if after diligent search and inquiry the name and residence of such owner cannot be ascertained, *it shall have the right to acquire title thereto by condemnation.* It shall also have such right in the following cases:

"1. Where title to real property has been acquired, or attempted to be acquired, and has been found to be invalid or defective.

"2. Where its railroad shall be lawfully in possession of a lessee, mortgagee, trustee or receiver, and additional real property shall be required for the purpose of running or operating such railroad.

"3. Where it shall require *any further rights to lands or the use of lands* for switches, turnouts or for filling any structures of its road, or for constructing, widening or completing any of its embankments or roadbeds, by means of which greater safety or permanency may be secured, and such lands shall be contiguous to such railroad and reasonably accessible to the place where the same are to be used for such purpose or purposes.

"4. Where it shall require any further right to lands or to the use of lands for the flow of water occasioned by railroad embankments or structures now in use, or hereafter rendered necessary, *or for any other purpose necessary for the operation of such railroad*, or for any right to take and convey water from any spring, pond, creek or river to such railroad, for the uses and purposes thereof, together with the right to build or lay aqueducts or pipes for the purpose of conveying such water, and to take up, relay and repair the same,

" or for any right of way required for carrying away or " diverting any water, stream or floods from such rail- " road for the purpose of protecting its road *or for the* " *purpose of preventing any* embankment, excavation or " *structure of such railroad from injuring the property* " *of any person who may be rendered liable to injury* " *thereby.*

" Waters commonly used for domestic, agricultural or " manufacturing purposes shall not be taken by condem- " nation to such an extent as to injuriously interfere with " such use in future. No railroad corporation shall have " the right to acquire by condemnation any right or ease- " ment in or to any real property owned or occupied by " any other railroad corporation, except the right to " intersect or cross the tracks and lands owned or held " for right of way by such other corporation, without " appropriating or affecting any lands owned or held for " depots or gravel-beds."

Code of Civil Procedure.

"Sec. 3359. WHEN PROCEEDINGS PRESCRIBED IN THIS TITLE TO BE TAKEN.

"Whenever any person is authorized to acquire title to "real property, for a public use *by condemnation*, the pro- "ceeding for that purpose shall be taken in the manner "prescribed in this title."

By Sec. 3375 possession of the property taken can only be had after payment of the compensation awarded by the judgment.

Supreme Court of the United States.

No. 99.—October Term, 1904.

Henry Muhlker, Plaintiff in Error, *vs.* The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company.	In Error to the Supreme Court of the State of New York.

[April 10, 1905.]

Plaintiff sues to enjoin the use of a certain elevated railroad structure on Park avenue, in the city of New York, in front of his premises, unless upon payment of the fee value of certain easements of light, air and access and other rights appurtenant to his premises. He also prays damages for injury sustained from the year 1890 to time of trial.

From the evidence in the case the Supreme Court found that the plaintiff had been since 1888 the owner of a lot of land on the northwesterly corner of Park Avenue and One Hundred and Fifteenth Street, on which he, in 1891, erected a five-story brick building, and that there were appurtenant to said lot and building "certain easements of light, air and access in and over said Park Avenue, in front of said premises." The defendant, The New York

and Harlem Railroad Company, is and was during all the times mentioned herein the owner of a railroad and railroad structures in Park Avenue, in front of such premises, and the New York Central and Hudson River Railroad Company is the lessee of said railroad and structures under a lease dated April 1, 1873, for a term of four hundred and one years; that said railroad, prior to 1872, was operated on two tracks laid upon the surface of said avenue and along the center thereof, in front of said premises.

In pursuance of chapter 72 of the Laws of 1872 certain changes were made in the railroad in front of said premises, between the years 1872 and 1874, whereby the number of tracks was increased from two to four and were laid along the center of the avenue, and at the south line of said premises were at the surface, and at the north line of said premises were laid in a trench about five and a half feet below the surface. In front of said premises the railroad was bounded on both sides by masonry walls about three feet high above the surface, and cut off access across said avenue immediately in front of said premises.

The New York Central and Hudson River Railroad Company in 1872 operated its trains over the railroad in front of said premises, and continued to do so until February 16, 1897.

The other facts are expressed in the finding of the court as follows:

> "FOURTH.—That pursuant to chapter 339 of the Laws of 1892, there was constructed along Park avenue, in front of plaintiff's said premises, between April, 1893, and March, 1896, a new permanent elevated railroad structure of iron and steel; that said railroad in front of plaintiff's said premises is about 59 feet wide and consists of four tracks laid on a solid roadbed, having a mean elevation of about 31 feet above the surface of said avenue, which roadbed is girded along the sides and in the center by solid iron girders, each 7 feet and 4 inches high, and is

supported by iron columns, of which there are six directly in front of plaintiff's said premises; and that the work of constructing said permanent elevated railroad structure was done under the supervision of a board created by said act.

"FIFTH.—That the defendant The New York Central and Hudson River Railroad Company laid the tracks on said permanent elevated railroad structure about March, 1896, and from said date down to February 16th, 1897, operated thereon in front of said premises trains of cars drawn by steam engines for the carriage of freight and material used in the construction of said structure, for which service said defendant was paid; that said defendant on February 16, 1897, began to operate regularly and permanently upon said permanent elevated railroad structure in front of plaintiff's said premises its passenger trains, drawn by steam locomotives.

"SIXTH.—That the rental and fee values of the plaintiff's said premises were damaged by the work of constructing said permanent elevated railroad structure and by the existence of the same from April, 1893, to March, 1896; also by said structure and the operation thereon of trains, as aforesaid, from March, 1896, to February 16, 1899, but that neither of said defendants is liable for such damage.

"SEVENTH.—That said permanent structure and the operation by said defendant, The New York Central and Hudson River Railroad Company, of passenger trains thereon since February 16th, 1897, are and have been a continuous trespass upon the plaintiff's easements of light and air appurtenant to his said premises, hereinbefore described as having a frontage of 76 feet and 10 inches on said Park avenue and a depth of 26 feet on 115th street; that solely in consequence of said trespass, and aside from any other causes, the rental and usable value of said premises was depreciated from February 16, 1897, down to October 10, 1900, in the sum of fourteen hundred dollars ($1,400) below what said rental value would have been during said period, if there had been no change in defendants' said railroad

in Park avenue in front of said premises pursuant to chapter 339 of the Laws of 1892; and that the fee value of said premises has been, and was on October 10, 1900, depreciated thereby in the sum of three thousand dollars ($3,000) below what said fee value would have been on said date if there had been no change in defendant's railroad as aforesaid.

"EIGHTH.—That the said sums awarded as damages are over and above any and all benefits conferred upon said premises by the changes made, pursuant to chapter 339 of the Laws of 1892, which said benefits result in part from improved access to said premises afforded by said changes, and are offset against the damages to said premises caused by said changes.

"NINTH.—That the said sums awarded as damages are exclusive of the damages that would have been occasioned to plaintiff's premises by the maintenance and use of the defendant's railroad and structures had there been no change in the same pursuant to chapter 339 of the Laws of 1892, for which last-mentioned damages the defendants are not liable either jointly or severally.

"TENTH.—That this action was commenced by the plaintiff on January 7, 1897, that the plaintiff on April 28, 1892, began an action in this court against the defendant for an injunction and damage by reason of the defendant's railroad structure and the operation of trains thereon in front of the premises described herein, as said railroad existed and was operated on said date; and that said last-mentioned action was discontinued on February 27, 1900."

A decree was entered enjoining the use of the railroad structure and its removal from in front of plaintiff's premises, but it was provided that the injunction should not become operative if the defendants' tender for the purpose of execution by the plaintiff "a form of conveyance and release" to them of the easements of light, air and access appurtenant to said premises, and tender further of the sum of $3,000, with interest thereon from October 10, 1900. Damages were also adjudged to plain-

tiff in the sum of $1,400, with interest from February 16, 1897, and cost. Either party was given the right to move at the foot of the decree for further directions as to the enforcement of the same.

In the form of the decision and judgment entered, and as to the legal principles involved, the court professed to follow *Lewis* vs. *New York & Hudson River Railroad* (162 N. Y., 202.)

The judgment was affirmed by the Appellate Division. It was reversed by the Court of Appeals, 173 N. Y. 549; and the judgment of that court, upon the remission of the case, was made the judgment of the Supreme Court and the complaint dismissed without costs. The case was then brought here.

Mr. Justice McKenna, after stating the case, announced the judgment of the Court and delivered the following opinion:

As we have observed, the Supreme Court followed *Lewis* v. *New York & Hudson River Railroad* (162 N. Y. 202), both in the "form of decision and judgment" and "the legal principles involved." Discussion was not considered necessary. The Appellate Division affirmed the judgment on the authority of the same case and other cases which had been ruled by it. The court, by brief expression, pointed out the identity of the cases and disposed of the defence made by the railroad companies of adverse possession as follows:

> "The question of defendants having acquired title by adverse possession was considered by this court in both the Fries and Sanders cases. In the former it was said: 'For these reasons the deed to the city was valid as against the railroad company, and it had no title to that part of the street in front of the plaintiff's premises, and its only rights, therefore, were

those which it had acquired by adverse possession. Within the rule laid down in the case of *Lewis* vs. *New York & Harlem R. R. Co.* (cited above), that adverse possession did not give to the railroad company the right to carry its tracks, which for twenty years had run in a cut, upon a viaduct such as this is above ground, in front of the plaintiff's premises. The case of Lewis applies fully to the one at bar.' In the Sanders case this court followed the decision just quoted, the presiding justice dissenting on the sole ground that 'Title by adverse possession as to the twenty-four feet strip, at least, was established by the evidence,''

In the case at bar there is a complete change of ruling by the Court of Appeals. The Lewis case is declared, in so far as it expressed rights of abutting property owners, to have have been improvidently decided, and the Elevated Railroad cases, which were made its support, were distinguished. The court rested its ruling on one point, the effect of the act of 1892, under which the structure complained of was erected, the court declaring that act a command to the railroad company in the interest of the public; indeed, made the State the builder of the new structure and the use of it by the railroads mere obedience to law. But it does not follow that private property can be taken either by the erection of the structure or its use. This was plainly seen and expressed in the Lewis case as to the use of the structure. It was there said: "When they (the railroads) commence to use the steel viaduct, they started a new trespass upon the rights of abutting owners." There was no hesitation then in marking the line between the power of the State and the duty of the railroad, and assigning responsibility to the latter. This was in accordance with principle. The command of the State, the duty of the railroad to obey, may encounter the inviolability of private property. And in perform-

ng the duties devolved upon it a railroad may be required to exercise the right of eminent domain (*Jacobson* v. *Wisconsin, Minn. & Pac. R. R.*, 179 U. S. 287); see also *Mayor and Aldermen of Worcester* v. *Norwich and Worcester R. R.* (109 Mass. 103). We do not, therefore, solve the questions in this case by reference to the power of the State and the duty of the railroads; the rights of abutting property owners must be considered, and against their infringement plaintiff urges the contract clause of the Constitution of the United States and the Fourteenth Amendment. The latter is invoked because the act of 1892 does not provide for compensation to property owners, and the former on account of the conditions upon which the strip of land constituting the avenue was conveyed to the city. There were two deeds to the city, one made in 1825 and the other in 1827. That of 1825 was stated to be "in trust, nevertheless, that the same be appropriated and be kept open as parts of public streets and avenues forever, in like manner as the other public streets and avenues in said city are and of right ought to be." The deed of 1827 was also "in trust that the same be left open as public streets for the use and benefit of the inhabitants of said city forever." Plaintiff derives title from Poillon, grantor of the city in the deed of 1827, and hence contends that he is entitled to enforce the trust created by Poillon's deed to the city. The railroads oppose this contention. They assert title to the land upon which the structure complained of stands by deed and by prescription. The details of these contentions we need not repeat nor discuss. They are stated at length in the Lewis case, and the conclusions there expressed are not disturbed by the decision of the Court of Appeals in the case at bar. The case is therefore presented to us as to the effect of the deed of Poillon to the plaintiff and to the city as constituting a contract, and the effect of the act of 1892 as an impairment of that contract or as taking plaintiff's prop-

erty without due process of law. These questions were directly passed on and negatived by the Court of Appeals.

It will be observed from the statement of facts that before the construction of the viaduct complained of the railroad ran partly on the surface of the street and partly in a cut or trench, the latter being flanked by masonry walls three feet high. The viaduct is a solid roadbed thirty-one feet above the surface, having iron girders on the sides and in the middle, and supported by iron columns, of which there are six in front of the plaintiff's land. The old construction prevented crossing or access to the tracks. The new construction impairs or destroys the plaintiff's easements of light and air. And such easements the trial Court found belonged to plaintiff in common with other abutters upon the public streets of New York and his damages for their impairment to be, as expressed by Bartlett, *J.*, in his dissenting opinion, "$3,000 fee damages, $1,400 rental damages, from February 16, 1897, to October 10, 1900," the date of trial, that is, $4,400 present damage. It is suggested, however, that the Court of Appeals did not deny the rights of the abutters, but considered that the most important phase of those rights was that of access, and the plaintiff did not have this over the railroad by reason of the stone wall. The basis of the suggestion, as we understand, is the idea that plaintiff was compensated for the injury of his easements of light and air by an increase of his easement of access without regard to the resulting damage. To do this, however, is to make one easement depend upon another, both of which are inseparable attributes of property and equally necessary to its enjoyment. It is impossible for us to conceive of a city without streets, or any benefit in streets, if the property abutting on them has not attached to it as an essential and inviolable part, easements of light and air as well as of access. There is something of mockery

to give one access to property which may be unfit to live on when one gets there. To what situation is the plaintiff brought? Because he can cross the railroad at more places on the street, the State, it is contended, can authorize dirt, cinders and smoke from 200 trains a day to be poured into the upper windows of his house.

In *Barnett* v. *Johnson* (15 N. J. Eq. 481), there is a clear expression of the right of abutting owners to light and air, and of the common practice and sense of the world upon which it is founded. "It is a right," the court said, "founded in such an urgent necessity that all laws and legal proceedings take it for granted. A right so strong that it protects itself, so urgent that, upon any attempt to annul or infringe it, it would set at defiance all legislative enactments and all judicial decisions." And, graphically describing the right, observed further, "Is not every window and every door in every house in every city, town and village the assertion and maintenance of this right?" It has been said *Barnett* v. *Johnson* anticipated "the principle upon which compensation was at last secured in the Elevated Railroad cases in New York." (1 Lewis Eminent Domain, 183.)

It is manifest that easements of light and air cannot be made dependent upon the easement of access, and whether they can be taken away in the interest of the public under the conditions upon which the city obtained title to the streets is now to be considered. The answer depends upon the cases of *Story* vs. *New York Elevated R.R. Co.* (90 N. Y., 122) and *Lahr* vs. *Metropolitan Elevated R.R. Co.* (104 N. Y., 268), known as the Elevated Railroad cases. The Lahr case was decided in 1887. The plaintiff in the case at bar acquired title to his property in 1888.

The first of the Elevated Railroad cases was the Story case, decided in 1882. The plaintiff in the case was the owner of a lot on the corner of Moore and Front Streets in the City of New York, on which there were buildings.

To their enjoyment light, air and access were indispensable, and were had through Front Street. The defendant was about to construct a railroad above the surface of that street upon a series of columns, about fifteen inches square, fourteen feet and six inches high, placed five inches inside of the sidewalk, with girders from thirty-three to thirty-nine inches deep, for the support of cross ties for three sets of rails for a steam railroad. The cars were to be of such a construction as to reach within nine feet of plaintiff's buildings, and trains were to be run every three minutes, and at a rate of speed as high as eighteen miles an hour.

The fact of injury to the abutting lot was found by the trial court, and also that the city of New York was the owner in fee of Front Street, opposite plaintiff's lots, and that he was not and never had been seized of the same in fee nor had any estate therein.

The Supreme Court said the case involved the question whether the scheme of the defendant amounted to the taking of any property of the plaintiff; if it did, it was said, the judgment was invalid, on the ground that the intended act, when performed, would violate not only the provision of the Constitution, which declared that such property should not be taken without just compensation, but certain statutes by which defendant was bound or owed its existence, and which would not have been upheld unless, in the opinion of the court, they had provided means to secure such compensation.

The plaintiff contended that, as owner of the abutting premises, he had the fee to one-half of the bed of the street opposite thereto, and he also contended, if the fee was in the city, he, as abutting owner, had such right to have light and access afforded by the street above the roadbed as entitled him to have it kept open for those uses until by legal process and upon just compensation

that right was taken away. The defendant justified its intended acts through the permission of the city. The issue thus made the court passed on, and in doing so assumed that the city owned the fee of the street and that the plaintiff derived his title from the city. It was held that the plaintiff had acquired "the right and privilege of having the street forever kept open as such;" and that the right thus secured was an incorporeal hereditament, which "became at once appurtenant to the lot and formed an 'integral part of the estate' in it," and which followed the estate and constituted a perpetual encumbrance upon the land burdened with it. "From the moment it attached," the court observed, "the lot became the dominant and the open way or street the servient tenement." Cases were cited for these propositions. And the extent of the easement was defined to be not only access to the lot, but light and air from it. The court said: "The street occupies the surface, and to its uses the rights of the adjacent lots are subordinate, but *above the surface* there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner." And further: "The elements of light and air are both to be derived from the space *over* the land on the *surface* of which the street is constructed and which is made servient for that purpose." This was emphasized, the court observing: "Before any interest passed to the city the owner of the land had from it the benefit of air and light. *The public purpose of a street requires of the soil the surface only.*" The easement was declared to be property and within the protection of the constitutional provision for compensation for its diminution by the contemplated structure.

It is, of course, impossible to reproduce the argument of the court by which its conclusions were sustained. It is enough to say that a distinction was clearly made between the rights of abutting owners in the *surface* of the

street and their rights in the *space above* the street, and the distinction was also clearly made between damages and a taking. A review was made of the cases upon which those distinctions rested. The power of a city to alter a grade of a street was adverted to, and held not to justify the intended structure. There was no change in the street surface intended, it was said, "but the elevation of a structure useless for street purposes and as foreign thereto," as the house which was held to be an obstruction in *Corning* vs. *Lowerre* (6 Johns. Ch., 439), or the freight depot in *Barney* vs. *Keokuk* (94 U. S., 324).

The conclusion of the Court and the distinctions made by it were repeated in *Lahr* vs. *Metropolitan Elevated R.R. Co.* (104 N. Y., 271). The structure complained of in the latter case was also an elevated railroad.

Chief Judge Ruger, speaking for the court, opened his opinion by observing that the action was "the sequel of the Story case," and that its defense seemed to have been conducted upon the theory of endeavoring to secure a re-examination of that case. The endeavor, it was said, must fail, because the doctrine of the Story case had been pronounced after most careful and thorough consideration and after two arguments at the bar, made by most eminent counsel, had apparently exhausted the resources of learning and reasoning in the discussion of the question presented. And it was declared that "it would be the occasion of great public injury if a determination thus made could be inconsiderately unsettled and suffered again to become the subject of doubt and theme of renewed discussion." The doctrine of the Story case was declared to be *stare decisis*, not only upon all the questions involved, but upon all that came logically within the principles decided. There was an enumeration of those principles, as follows:

(1) That an elevated railroad, of the kind described, was a perversion of the use of a street, which neither the

city nor the legislature could legalize without providing compensation for the injury inflicted upon the property of abutting owners.

(2) That abutters upon a public street, claiming title by grant from the municipal authorities, which contained a covenant that streets which could be laid out should continue as other streets, acquired an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street for the benefit of the property situated thereon.

(3) That such easement was an interest in real estate and constituted property, within the meaning of the Constitution of the State, and could not be taken for a public use without payment of compensation.

(4) That an elevated railroad, upon which cars propelled by steam engines which generated gas, steam and smoke and distributed in the air cinders, dust, ashes, and other noxious and deleterious substances, and interrupted the free passage of light and air to and from adjoining premises, constituted a taking of the easement, and rendered the railroad company liable for the damages occasioned by such taking.

The application of these principles was resisted on the ground that the city was the grantor of the plaintiff in the Story case and could not derogate from the title a property it conveyed, and it was contended that the case went off on that ground. This was rejected and the principles enumerated held to apply, notwithstanding the land in the street had been taken from plaintiff's grantor by proceedings *in invitum*. And rights of abutting owners were held to rest in contract constituted by the conditions upon which the city received the property.

[illegible] untenable are the grounds of distinction urged

in the case at bar against the application of those principles. What are they? In the Story and Lahr cases the railroads were imposed for the first time on the street. In the case at bar the Harlem railroad had occupied the surface of the street, and was changed to the viaduct. But in the Story and Lahr cases it was not the fact that the railroads were imposed on the street for the first time that determined the judgment rendered. It was the fact that trains were run upon an elevated structure, interrupting the easements of light and air of the abutting owners. It was this that constituted a use inconsistent with the purpose of the street. It was the "elevation of a structure," to quote again from the Story case, "useless for general street purposes." This situation of the railroad was especially dwelt upon in the Story case, and that case was distinguished thereby from the Surface Railway cases. And in the Lewis case a difference was recognized between the two situations and a balance struck between damage done by the railroad in one situation and the railroad in the other situation. The Lewis case, we have seen, was overruled by the Court of Appeals in the case at bar, while the Story and Lahr cases were said not to be in point. We think that the Lewis case was an irresistible consequence of the others, and the Story and Lahr cases are in point and decisive.

Another distinction is claimed, as we have already observed, between the case at bar and those cases. The act of the railroad in occupying the viaduct, it is said, was the act of the State. But this defence was made in the other cases. It did not give the court much trouble. It is urged, however, now, with an increased assurance. Indeed, it is made the ground of decision, as we have seen by the Court of Appeals. The court said: "The decisions in the Elevated Railroad cases are not in point. There no attempt was made by the State to improve the street for the benefit of the public. Instead, it granted to a corpo-

ration the right to make an additional use of the street, in the doing of which it took certain easements belonging to abutting owners, which it was compelled to compensate them for." And, further, making distinction between those cases and that at bar, said: "The State could not if it would — and probably would not if it could —deprive defendant of its rights to operate its trains in the street. But it had the power in the public interest to compel it to run its trains upon a viaduct instead of in the subway." And the court concluded that it was the State, not the railroads, who did the injury to plaintiff's property. The answer need not be hesitating. The permission, or command of the State, can give no power to invade private rights, even for a public purpose without payment of compensation; and payment of such compensation, when necessary to the performance of the duties of a railroad company, may be, as we have already observed, part of its submission to the command of the State. The railroads paid one-half of the expense of the change, "by the command of the statute, and hence under compulsion of law," to quote from the Court of Appeals. The public interest therefore, is made too much of. It is given an excessive, if not a false quantity. Its use as a justification is open to the objection made at the argument; it enables the State to do by two acts that which would be illegal if done by one. In other words, as under the law of New York the State can authorize a railroad to occupy the surface of a street it can subsequently permit or order the railroad to raise its tracks above the street and justify the impairment of property rights by the public interest. It was said in the Story case that "the public purpose of a street requires of the soil the surface only." And this was followed in *Fobes* v. *R. W. & O. R. Co.* (121 N. Y. 505), where a steam railroad was permitted upon a street without liability for consequen-

tial damages to adjoining property. The new principle based upon the public interest destroys all distinction between the surface of the soil of a street and the space above the surface, and, seemingly, leaves remaining no vital remnant of the doctrine of the Elevated Railroad cases. However, we need not go farther than the present case demands. When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.

And this is the ground of our decision. We are not called upon to discuss the power or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of State decisions the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the Elevated Railroad cases and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, and that these decisions might have been different or that the plaintiff might have balanced the chances of the commercial advantage between the right to have the street remain open and the expectation that it would remain so is too intangible to estimate. We certainly can estimate the difference between a building with full access of light and air and one with those elements impaired or polluted. But we have already expressed this. We need only add that the right of passage is not all there is to a street, and to call it the primary right is more or less delusive. It is the more

conspicuous right, has the importance and assertion of community interest and ownership, properly has a certain dominance, but it is not more necessary to the making of a city than the rights to light and air, held, though the latter are, in individual ownership and asserted only as rights of private property. The true relation and subordination of these rights, public and private, is expressed, not only by the Elevated Railroad cases, but by other cases. They are collected in 1 Lewis Eminent Domain, section 91*c*, and it is there said, "established beyond question the existence of these rights, or easements of light, air and access, as appurtenant to abutting lots, and that they are as much property as the lots themselves."

Judgment is reversed and cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice BROWN concurs in the result.

True copy.

Test:

[SEAL.] JAMES H. MCKENNEY,
Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 99.—October Term, 1904.

Henry Muhlker, Plaintiff in Error, *vs.* The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company.	In error to the Supreme Court of the State of New York.

[April 10, 1905.]

Mr. Justice Holmes dissenting.

I regret that I am unable to agree with the judgment of the Court, and as it seems to me to involve important principles I think it advisable to express my disagreement and to give my reasons for it.

The plaintiff owns no soil within the limits of the avenue. The New York and Harlem Railroad Company at the time of the change was and long had been the owner, and the other defendant was the lessee of a railroad with four tracks along the middle of Park avenue, in front of the plaintiff's land, at the south end being at the surface of the avenue, and at the north in a trench about four feet and a half deep, the railroad being bounded on both sides by a masonry wall three feet high, which prevented crossing or access to the tracks. This is the finding

of the Court of first instance, and I take it to be binding upon us. We have nothing to do with the evidence. I take it to mean the same thing as the finding in *Fries* v. *New York & Harlem R.R.*, 169 N. Y. 270, that the defendants had "acquired the right without liability to the plaintiff to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16, 1897." The material portion of the decision of the Court of Appeals is that on this state of facts, as was held in the similar case of *Fries* v. *New York & Harlem R.R.*, the plaintiff had no property right which was infringed in such a way as to be anything more than *damnum absque injuria*. The finding that the railroad had the right to maintain the former structures was held to distinguish the case from the Elevated Railroad cases, where pillars were planted in the street without right as against the plaintiff. *Story* v. *New York Elevated R.R.*, 90 N.Y. 122, 160, 170, 178. *Lahr* v. *Metropolitan Elevated Ry.*, 104 N.Y. 268. The other so-called finding, that the new structure infringes the plaintiff's right, is merely a ruling of law that notwithstanding the facts specifically found the plaintiff has a cause of action by reason of his being an abutter upon a public street.

The plaintiff's rights, whether expressed in terms of property or of contract, are all a construction of the Courts, deduced by way of consequence from dedication to and trusts for the purposes of a public street. They never were granted to him or his predecessors in express words, or, probably, by any conscious implication. If at the outset the New York Courts had decided that apart from statute or express grant the abutters on a street had only the rights of the public and no private easement of any kind, it would have been in no way amazing. It would have been very possible to distinguish between the practical commercial advantage of the expecta-

tion that a street would remain open and a right *in rem* that it should remain so. See *Stanwood* v. *Malden*, 157 Mass. 17. Again, more narrowly, if the New York Courts had held that an easement of light and air could be created only by express words, and that the laying out or dedication of a street, or the grant of a house bounding upon one, gave no such easement to abutters, they would not have been alone in the world of the common law. *Keats* v. *Hugo*, 115 Mass. 204, 216. The doctrine that abutters upon a highway have an easement of light and air is stated as a novelty in point of authority in *Barrett* v. *Johnson*, 15 N. J. Eq. 481, 489, and that case was decided in a State where it was held that a like right might be acquired by prescription. *Robeson* v. *Pittenger*, 1 Green Ch. 57.

If the decisions, which I say conceivably might have been made, had been made as to the common law, they would have infringed no rights under the Constitution of the United States. So much, I presume, would be admitted by every one. But if that be admitted, I ask myself what has happened to cut down the power of the same Courts as against that same Constitution at the present day. So far as I know the only thing which has happened is that they have decided the Elevated Railroad cases, to which I have referred. It is on that ground alone that we are asked to review the decision of the Court of Appeals upon what otherwise would be purely a matter of local law. In other words, we are asked to extend to the present case the principle of *Gelpcke* v. *Dubuque*, 1 Wall. 175, and *Louisiana* v. *Pilsbury*, 105 U. S. 278, as to public bonds bought on the faith of a decision that they were constitutionally issued. That seems to me a great, unwarranted and undesirable extension of a doctrine which it took this Court a good while to explain. The doctrine now is explained, however, not to mean that a change in the decision impairs the obligation of contracts,

Burgess v. *Seligman*, 107 U. S. 20, 34; *Stanly County* v. *Coler*, 190 U. S. 437, 444, 445, and certainly never has been supposed to mean that all property owners in a State have a vested right that no general proposition of law shall be reversed, changed or modified by the Courts if the consequence to them will be more or less pecuniary loss. I know of no constitutional principle to prevent the complete reversal of the Elevated Railroad cases to-morrow, if it should seem proper to the Court of Appeals. See *Central Land Co.* v. *Laidley*, 159 U. S. 103.

But I conceive that the plaintiff in error must go much further than to say that my last proposition is wrong. I think he must say that he has a constitutional right not only that the State Courts shall not reverse their earlier decisions upon a matter of property rights, but that they shall not distinguish them unless the distinction is so fortunate as to strike a majority of this court as sound. For the Court of Appeals has not purported to overrule the Elevated Railroad cases. It simply has decided that the import and the intent of those cases does not extend to the case at bar. In those cases the defendants had impaired the plaintiff's access to the street. It is entirely possible and consistent with all that they decided to say now that access is the foundation of the whole matter; that the right to light and air is a parasitic right incident to the right to have the street kept open for purposes of travel, and that when, as here, the latter right does not exist the basis of the claim to light and air is gone.

But, again, if the plaintiff had an easement over the whole street he got it as a tacit incident of an appropriation of the street to the uses of the public. The legislature and the Court of Appeals of New York have said that the statute assailed was passed for the benefit of the public using the street, and I accept their view. The most obvious aspect of the change is that the whole street now

is open to travel, and that an impassable barrier along its width has been removed; in other words that the convenience of travellers on the highway has been considered and enhanced. Now still considering distinctions which might be taken between this and the earlier cases, it was possible for the New York Courts to hold, as they seem to have held, that the easement which they had declared to exist is subject to the fullest exercise of the primary right out of which it sprang, and that any change in the street for the benefit of public travel is a matter of public right, as against what I have called the parasitic right which the plaintiff claims. *Scranton* v. *Wheeler*, 179 U. S. 141. *Gibson* v. *United States*, 166 U. S. 269.

The foregoing distinctions seem to me not wanting in good sense. Certainly I should have been inclined to adopt one or both of them, or in some way to avoid the earlier decisions. But I am not discussing the question whether they are sound. If my disagreement was confined to that I should be silent. I am considering what there is in the Constitution of the United States forbidding the Court of Appeals to hold them sound. I think there is nothing; and there being nothing, and the New York decision obviously not having been given its form for the purpose of evading this Court, I think we should respect and affirm it, if we do not dismiss the case.

What the plaintiff claims is really property, a right *in rem*. It is called contract merely to bring it within the contract clause of the Constitution. It seems to me a considerable extension of the power to determine for ourselves what the contract is, which we have assumed when it is alleged that the obligation of a contract has been impaired, to say that we will make the same independent determination when it is alleged that property is taken without due compensation. But it seems to me that it does not help the argument. The rule adopted as to contract is simply a rule to prevent an evasion of the constitutional

limit to the power of the States, and, it seems to me, should not be extended to a case like this. Bearing in mind that, as I have said, the plaintiff's rights, however expressed, are wholly a construction of the Courts, I cannot believe that whenever the Fourteenth Amendment or Article 1, Section 10, is set up we are free to go behind the local decisions on a matter of land law, and, on the ground that we decide what the contract is, declare rights to exist which we should think ought to be implied from a dedication or location if we were the local Courts. I cannot believe that we are at liberty to create rights over the streets of Massachusetts, for instance, that never have been recognized there. If we properly may do that, then I am wrong in my assumption that if the New York Courts originally had declared that the laying out of a public way conferred no private rights we should have had nothing to say. But if I am right, if we are bound by local decisions as to local rights in real estate, then we equally are bound by the distinctions and the limitations of those rights declared by the local Courts. If an exception were established in the case of a decision which obviously was intended to evade constitutional limits, I suppose I may assume that such an evasion would not be imputed to a judgment which four Justices of this Court think right.

As I necessarily have dealt with the merits of the case for the purpose of presenting my point, I will add one other consideration. Suppose that the plaintiff has an easement and that it has been impaired, bearing in mind that his damage is in respect of light and air, not access, and is inflicted for the benefit of public travel, I should hesitate to say that in inflicting it the legislature went beyond the constitutional exercise of the police power. To a certain and to an appreciable extent the legislature may alter the law of nuisance, although property is affected. To a certain and to an appreciable extent the use of particular property may be limited without compensation.

Not every such limitation, restriction or diminution of value amounts to a taking in a constitutional sense. I have a good deal of doubt whether it has been made to appear that any right of the plaintiff has been taken or destroyed for which compensation is necessary under the Constitution of the United States. *Scranton* v. *Wheeler*, 179 U. S. 141. *Meyer* v. *Richmond*, 172 U. S. 82. See *Mugler* v. *Kansas*, 123 U. S. 623, 668. *Merchant* v. *Pennsylvania R. R.*, 153 U. S., 380. *Canfield* v. *United States*, 167 U. S. 518, 523. *People* v. *D'Oench*, 111 N. Y. 359, 361. *Sawyer* v. *Davis*, 136 Mass. 239. *Commonwealth* v. *Alger*, 7 Cush. 53. Compare *United States* v. *Lynah*, 188 U. S. 445, 470.

I am authorized to say that the CHIEF JUSTICE, Mr. Justice WHITE and Mr. Justice PECKHAM concur in the foregoing dissent.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 99.—October Term, 1904.

Henry Muhlker, Plaintiff in Error,
vs.
The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company.

In error to the Supreme Court of the State of New York.

[April 10, 1905.]

Plaintiff sues to enjoin the use of a certain elevated railroad structure on Park avenue, in the city of New York, in front of his premises, unless upon payment of the fee value of certain easements of light, air and access and other rights appurtenant to his premises. He also prays damages for injury sustained from the year 1890 to time of trial.

From the evidence in the case the Supreme Court found that the plaintiff had been since 1888 the owner of a lot of land on the northwesterly corner of Park avenue and One Hundred and Fifteenth street, on which he, in 1891, erected a five-story brick building, and that there were appurtenant to said lot and building "certain easements of light, air and access in and over said Park avenue, in front of said premises." The defendant, The New York and Harlem Railroad Company, is and was during all the times mentioned herein the owner of a railroad and railroad structures in Park avenue, in front of such premises, and the New York Central and Hudson River Railroad Company is the lessee of said railroad and structures under a lease dated April 1, 1873, for a term of four hundred and one years; that said railroad, prior to 1872, was operated on two tracks laid upon the surface of said avenue and along the center thereof, in front of said premises.

In pursuance of chapter 72 of the Laws of 1872 certain changes were made in the railroad in front of said premises, between the years 1872 and 1874, whereby the number of tracks was increased from two to four and were laid along the center of the avenue, and at the south line of said premises were at the surface, and at the north line of said premises were laid in a trench about five and a half feet below the surface. In front of said premises the railroad was bounded on both sides by masonry walls about three feet high above the surface, and cut off access across said avenue immediately in front of said premises.

The New York Central and Hudson River Railroad Company in 1872 operated its trains over the railroad in front of said premises, and continued to do so until February 16, 1897.

The other facts are expressed in the finding of the court as follows:

"Fourth. That pursuant to chapter 339 of the Laws of 1892, there was constructed along Park avenue, in front of plaintiff's said premises, between April, 1893, and March, 1896, a new permanent elevated railroad structure of iron and steel; that said railroad in front of plaintiff's said premises is about 59 feet wide and consists of four tracks laid on a solid roadbed, having a mean elevation of about 31 feet above the surface of said avenue, which roadbed is girded along the sides and in the center by solid iron girders, each 7 feet and 4 inches high, and is supported by iron columns, of which there are six directly in front of plaintiff's said premises; and that the work of constructing said permanent elevated railroad structure was done under the supervision of a board created by said act.

"Fifth. That the defendant The New York Central and Hudson River Railroad Company laid the tracks on said permanent elevated railroad structure about March, 1896, and from said date down to February 16th, 1897, operated thereon in front of said premises trains of cars drawn by steam engines for the carriage of freight and material used in the construction of said structure, for which service said defendant was paid; that said defendant on February 16, 1897, began to operate regularly and permanently upon said permanent elevated railroad structure in front of plaintiff's said premises its passenger trains, drawn by steam locomotives.

"Sixth. That the rental and fee values of the plaintiff's said premises were damaged by the work of constructing said permanent elevated railroad structure and by the existence of the same from April, 1893, to March, 1896; also by said structure and the operation thereon of trains, as aforesaid, from March, 1896, to February 16, 1899, but that neither of said defendants is liable for such damage.

"Seventh. That said permanent structure and the operation by said defendant, The New York Central and Hudson River Railroad Company, of passenger trains thereon since February 16th, 1897, are and have been a continuous trespass upon the plaintiff's easements of light and air appurtenant to his said premises, hereinbefore described as having a frontage of 76 feet and 10 inches on said Park avenue and a depth of 26 feet on 115th street; that solely in consequence of said trespass, and aside from any other causes, the rental and usable value of said premises was depreciated from February 16, 1897, down to October 10, 1900, in the sum of fourteen hundred dollars ($1,400) below what said rental value would have been during said period, if there had been no change in defendants' said railroad in Park avenue in front of said premises pursuant to chapter 339 of the Laws of 1892; and that the fee value of said premises has been, and was on October 10, 1900, depreciated thereby in the sum of three thousand dollars ($3,000) below what said fee value would have been on said date if there had been no change in defendant's railroad as aforesaid.

"Eighth. That the said sums awarded as damages are over and above any and all benefits conferred upon said premises by the changes made, pursuant to chapter 339 of the Laws of 1892, which said benefits result in part from improved access to said premises afforded by said changes, and are offset against the damages to said premises caused by said changes.

"Ninth. That the said sums awarded as damages are exclusive of the damages that would have been occasioned to plaintiff's premises by the maintenance and use of the defendant's railroad and structures had there

been no change in the same pursuant to chapter 339 of the Laws of 1892, for which last-mentioned damages the defendants are not liable either jointly or severally.

"Tenth. That this action was commenced by the plaintiff on January 7, 1897, that the plaintiff on April 28, 1892, began an action in this court against the defendant for an injunction and damage by reason of the defendant's railroad structure and the operation of trains thereon in front of the premises described herein, as said railroad existed and was operated on said date; and that said last-mentioned action was discontinued on February 27, 1900."

A decree was entered enjoining the use of the railroad structure and its removal from in front of plaintiff's premises, but it was provided that the injunction should not become operative if the defendants' tender for the purpose of execution by the plaintiff "a form of conveyance and release" to them of the easements of light, air and access appurtenant to said premises, and tender further of the sum of $3,000, with interest thereof from October 10, 1900. Damages were also adjudged to plaintiff in the sum of $1,400, with interest from February 16, 1897, and cost. Either party was given the right to move at the foot of the decree for further directions as to the enforcement of the same.

In the form of the decision and judgment entered, and as to the legal principles involved, the court professed to follow *Lewis* v. *New York & Hudson River Railroad*, (162 N. Y. 202.)

The judgment was affirmed by the Appellate Division. It was reversed by the Court of Appeals, 173 N. Y. 549; and the judgment of that court, upon the remission of the case, was made the judgment of the Supreme Court and the complaint dismissed without costs. The case was then brought here.

Mr. Justice McKenna, after stating the case, announced the judgment of the Court and delivered the following opinion.

As we have observed, the Supreme Court followed *Lewis* v. *New York & Hudson River Railroad*, (162 N. Y. 202,) both in the "form of decision and judgment" and "the legal principles involved." Discussion was not considered necessary. The Appellate Division affirmed the judgment on the authority of the same case and other cases which had been ruled by it. The court, by brief expression, pointed out the identity of the cases and disposed of the defence made by the railroad companies of adverse possession as follows:

"The question of defendants having acquired title by adverse possession was considered by this court in both the Fries and Sanders cases. In the former it was said: 'For these reasons the deed to the city was valid as against the railroad company, and it had no title to that part of the street in front of the plaintiff's premises, and its only rights, therefore, were

those which it had acquired by adverse possession. Within the rule laid down in the case of *Lewis* v. *New York & Harlem R. R. Co.* (cited above), that adverse possession did not give to the railroad company the right to carry its tracks, which for twenty years had run in a cut, upon a viaduct such as this is above ground, in front of the plaintiff's premises. The case of Lewis applies fully to the one at bar.' In the Sanders case this court followed the decision just quoted, the presiding justice dissenting on the sole ground that 'Title by adverse possession as to the twenty-four feet strip, at least, was established by the evidence.'"

In the case at bar there is a complete change of ruling by the Court of Appeals. The Lewis case is declared, in so far as it expressed rights of abutting property owners, to have been improvidently decided, and the Elevated Railroad cases, which were made its support, were distinguished. The court rested its ruling on one point, the effect of the act of 1892, under which the structure complained of was erected, the court declaring that act a command to the railroad company in the interest of the public; indeed, made the State the builder of the new structure and the use of it by the railroads mere obedience to law. But it does not follow that private property can be taken either by the erection of the structure or its use. This was plainly seen and expressed in the Lewis case as to the use of the structure. It was there said: "When they (the railroads) commence to use the steel viaduct, they started a new trespass upon the rights of abutting owners." There was no hesitation then in marking the line between the power of the State and the duty of the railroad, and assigning responsibility to the latter. This was in accordance with principle. The command of the State, the duty of the railroad to obey, may encounter the inviolability of private property. And in performing the duties devolved upon it a railroad may be required to exercise the right of eminent domain. (*Jacobson* v. *Wisconsin, Minn. & Pac. R. R.*, 179 U. S. 287;) see also *Mayor and Aldermen of Worcester* v. *Norwich and Worcester R. R.*, (109 Mass. 103.) We do not, therefore, solve the questions in this case by reference to the power of the State and the duty of the railroads; the rights of abutting property owners must be considered, and against their infringement plaintiff urges the contract clause of the Constitution of the United States and the Fourteenth Amendment. The latter is invoked because the act of 1892 does not provide for compensation to property owners, and the former on account of the conditions upon which the strip of land constituting the avenue was conveyed to the city. There were two deeds to the city, one made in 1825 and the other in 1827. That of 1825 was stated to be "in trust, nevertheless, that the same be appropriated and be kept open as parts of public streets and avenues forever, in like manner as the other public streets and avenues in said city are and of right ought to be." The deed of 1827 was also "in trust that the same be left open as public streets for the use and benefit of the inhabitant

of said city forever." Plaintiff derives title from Polloin, grantor of the city in the deed of 1827, and hence contends that he is entitled to enforce the trust created by Pollion's deed to the city. The railroads oppose this contention. They assert title to the land upon which the structure complained of stands by deed and by prescription. The details of these contentions we need not repeat nor discuss. They are stated at length in the Lewis case, and the conclusions there expressed are not disturbed by the decision of the Court of Appeals in the case at bar. The case is therefore presented to us as to the effect of the deed of Poillon to the plaintiff and to the city as constituting a contract, and the effect of the act of 1892 as an impairment of that contract or as taking plaintiff's property without due process of law. These questions were directly passed on and negatived by the Court of Appeals.

It will be observed from the statement of facts that before the construction of the viaduct complained of the railroad ran partly on the surface of the street and partly in a cut or trench, the latter being flanked by masonry walls three feet high. The viaduct is a solid roadbed thirty-one feet above the surface, having iron girders on the sides and in the middle, and supported by iron columns, of which there are six in front of the plaintiff's land. The old construction prevented crossing or access to the tracks. The new construction impairs or destroys the plaintiff's easements of light and air. And such easements the trial court found belonged to plaintiff in common with other abutters upon the public streets of New York and his damages for their impairment to be as expressed by Bartlett, J., in his dissenting opinion, "$3,000 fee damages, $1,400 rental damages, from February 16, 1897, to October 10, 1900," the date of trial; that is, $4,400 present damage. It is suggested, however, that the Court of Appeals did not deny the rights of the abutters, but considered that the most important phase of those rights was that of access, and the plaintiff did not have this over the railroad by reason of the stone wall. The basis of the suggestion, as we understand, is the idea that plaintiff was compensated for the injury of his easements of light and air by an increase of his easement of access without regard to the resulting damage. To do this, however, is to make one easement depend upon another, both of which are inseparable attributes of property and equally necessary to its enjoyment. It is impossible for us to conceive of a city without streets, or any benefit in streets, if the property abutting on them has not attached to it as an essential and inviolable part, easements of light and air as well as of access. There is something of mockery to give one access to property which may be unfit to live on when one gets there. To what situation is the plaintiff brought? Because he can cross the railroad at more places on the street, the State, it is contended, can authorize dirt,

cinders and smoke from 200 trains a day to be poured into the upper windows of his house.

In *Barnett* v. *Johnson*, (15 N. J. Eq. 481,) there is a clear expression of the right of abutting owners to light and air, and of the common practice and sense of the world upon which it is founded. "It is a right," the court said, "founded in such an urgent necessity that all laws and legal proceedings take it for granted. A right so strong that it protects itself, so urgent that, upon any attempt to annul or infringe it, it would set at defiance all legislative enactments and all judicial decisions." And, graphically describing the right, observed further, "is not every window and every door in every house in every city, town and village the assertion and maintenance of this right?" It has been said *Barnett* v. *Johnson* anticipated "the principle upon which compensation was at last secured in the Elevated Railroad cases in New York." (1 Lewis Eminent Domain, 183.)

It is manifest that easements of light and air cannot be made dependent upon the easement of access, and whether they can be taken away in the interest of the public under the conditions upon which the city obtained title to the streets is now to be considered. The answer depends upon the cases of *Story* v. *New York Elevated R. R. Co.*, (90 N. Y. 122,) and *Lahr* v. *Metropolitan Elevated R. R. Co.*, (104 N. Y. 268,) known as the Elevated Railroad cases. The Lahr case was decided in 1887. The plaintiff in the case at bar acquired title to his property in 1888.

The first of the Elevated Railroad cases was the Story case, decided in 1882. The plaintiff in the case was the owner of a lot on the corner of Moore and Front streets in the city of New York, on which there were buildings. To their enjoyment light, air and access were indispensable, and were had through Front street. The defendant was about to construct a railroad above the surface of that street upon a series of columns, about fifteen inches square, fourteen feet and six inches high, placed five inches inside of the sidewalk, with girders from thirty-three to thirty-nine inches deep, for the support of cross ties for three sets of rails for a steam railroad. The cars were to be of such a construction as to reach within nine feet of plaintiff's buildings, and trains were to be run every three minutes, and at a rate of speed as high as eighteen miles an hour.

The fact of injury to the abutting lot was found by the trial court, and also that the city of New York was the owner in fee of Front street, opposite plaintiff's lots, and that he was not and never had been seized of the same in fee nor had any estate therein.

The Supreme Court said the case involved the question whether the scheme of the defendant amounted to the taking of any property of the plaintiff; if it did, it was said, the judgment was invalid on the ground that the intended act, when performed, would violate not only the provision of the Constitution, which declared that such property should not

be taken without just compensation, but certain statutes by which defendant was bound or owed its existence, and which would not have been upheld unless, in the opinion of the court, they had provided means to secure such compensation.

The plaintiff contended that, as owner of the abutting premises, he had the fee to one-half of the bed of the street opposite thereto, and he also contended, if the fee was in the city, he, as abutting owner, had such right to have light and access afforded by the street above the roadbed as entitled him to have it kept open for those uses until by legal process and upon just compensation that right was taken away. The defendant justified its intended acts through the permission of the city. The issue thus made the court passed on, and in doing so assumed that the city owned the fee of the street and that the plaintiff derived his title from the city. It was held that the plaintiff had acquired "the right and privilege of having the street forever kept open as such;" and that the right thus secured was an incorporeal hereditament, which "became at once appurtenant to the lot and formed an 'integral part of the estate' in it," and which followed the estate and constituted a perpetual encumbrance upon the land burdened with it. "From the moment it attached," the court observed, "the lot became the dominant and the open way or street the servient tenement." Cases were cited for these propositions. And the extent of the easement was defined to be not only access to the lot, but light and air from it. The court said: "The street occupies the surface, and to its uses the rights of the adjacent lots are subordinate, but *above the surface* there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner." And further: "The elements of light and air are both to be derived from the space *over* the land on the *surface* of which the street is constructed and which is made servient for that purpose." This was emphasized, the court observing: "Before any interest passed to the city the owner of the land had from it the benefit of air and light. *The public purpose of a street requires of the soil the surface only.*" The easement was declared to be property and within the protection of the constitutional provision for compensation for its diminution by the contemplated structure.

It is, of course, impossible to reproduce the argument of the court by which its conclusions were sustained. It is enough to say that a distinction was clearly made between the rights of abutting owners in the *surface* of the street and their rights in the *space above* the street, and the distinction was also clearly made between damages and a taking. A review was made of the cases upon which those distinctions rested. The power of a city to alter a grade of a street was adverted to, and held not to justify the intended structure. There was no change in the street surface intended, it was said, "but the elevation of a structure useless for

street purposes and as foreign thereto," as the house which was held to be an obstruction in *Corning* v. *Lowerre*, (6 Johns Ch. 439,) or the freight depot in *Barney* v. *Keokuk*, (94 U. S. 324.)

The conclusion of the court and the distinctions made by it were repeated in *Lahr* v. *Metropolitan Elevated R. R. Co.*, (104 N. Y. 271.) The structure complained of in the latter case was also an elevated railroad.

Chief Judge Ruger, speaking for the court, opened his opinion by observing that the action was "the sequel of the Story case," and that its defence seemed to have been conducted upon the theory of endeavoring to secure a re-examination of that case. The endeavor, it was said, must fail, because the doctrine of the Story case had been pronounced after most careful and thorough consideration and after two arguments at the bar, made by most eminent counsel, had apparently exhausted the resources of learning and reasoning in the discussion of the question presented. And it was declared that "it would be the occasion of great public injury if a determination thus made could be inconsiderately unsettled and suffered again to become the subject of doubt and theme of renewed discussion." The doctrine of the Story case was declared to be *stare decisis*, not only upon all the questions involved, but upon all that came logically within the principles decided. There was an enumeration of those principles, as follows:

(1) That an elevated railroad, of the kind described, was a perversion of the use of a street, which neither the city nor the legislature could legalize without providing compensation for the injury inflicted upon the property of abutting owners.

(2) That abutters upon a public street, claiming title by grant from the municipal authorities, which contained a covenant that streets which could be laid out should continue as other streets, acquired an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street for the benefit of the property situated thereon.

(3) That such easement was an interest in real estate and constituted property, within the meaning of the Constitution of the State, and could not be taken for a public use without payment of compensation.

(4) That an elevated railroad, upon which cars propelled by steam engines which generated gas, steam and smoke and distributed in the air cinders, dust, ashes, and other noxious and deleterious substances, and interrupted the free passage of light and air to and from adjoining premises, constituted a taking of the easement, and rendered the railroad company liable for the damages occasioned by such taking.

The application of these principles was resisted on the ground that the city was the grantor of the plaintiff in the Story case and could not derogate from the title a property it conveyed, and, it was contended, that the case went off on that ground. This was rejected and the principles enumerated held to apply, notwithstanding the land in the street had been taken from plaintiff's grantor by proceedings *in invitum*. And rights of abutting owners were held to rest in contract constituted by the conditions upon which the city received the property.

Equally untenable are the grounds of distinction urged in the case at bar against the application of those principles. What are they? In the Story and Lahr cases the railroads were imposed for the first time on the street. In the case at bar the Harlem railroad had occupied the surface of the street, and was changed to the viaduct. But in the Story and Lahr cases it was not the fact that the railroads were imposed on the street for the first time that determined the judgment rendered. It was the fact that trains were run upon an elevated structure, interrupting the easements of light and air of the abutting owners. It was this that constituted a use inconsistent with the purpose of the street. It was the "elevation of a structure," to quote again from the Story case, "useless for general street purposes." This situation of the railroad was especially dwelt upon in the Story case, and that case was distinguished thereby from the Surface Railway cases. And in the Lewis case a difference was recognized between the two situations, and a balance struck between damage done by the railroad in one situation and the railroad in the other situation. The Lewis case, we have seen, was overruled by the Court of Appeals in the case at bar, while the Story and Lahr cases were said not to be in point. We think that the Lewis case was an irresistible consequence of the others, and the Story and Lahr cases are in point and decisive.

Another distinction is claimed, as we have already observed, between the case at bar and those cases. The act of the railroad in occupying the viaduct, it is said, was the act of the State. But this defence was made in the other cases. It did not give the court much trouble. It is urged, however, now, with an increased assurance. Indeed, it is made the ground of decision, as we have seen by the Court of Appeals. The court said: "The decisions in the Elevated Railroad cases are not in point. There no attempt was made by the State to improve the street for the benefit of the public. Instead, it granted to a corporation the right to make an additional use of the street, in the doing of which it took certain easements belonging to abutting owners, which it was compelled to compensate them for." And, further, making distinction between those cases and that at bar, said: "The State could not if it would—and probably would not if it could—deprive defendant of its rights to operate its trains in the street. But it had the power in the public interest to compel it to run its trains

upon a viaduct instead of in the subway." And the court concluded that it was the State, not the railroads, who did the injury to plaintiff's property. The answer need not be hesitating. The permission, or command of the State, can give no power to invade private rights, even for a public purpose without payment of compensation; and payment of such compensation, when necessary to the performance of the duties of a railroad company, may be, as we have already observed, part of its submission to the command of the State. The railroads paid one-half of the expense of the change, "by the command of the statute, and hence under compulsion of law," to quote from the Court of Appeals. The public interest therefore, is made too much of. It is given an excessive, if not a false quantity. Its use as a justification is open to the objection made at the argument, it enables the State to do by two acts that which would be illegal if done by one. In other words, as under the law of New York the State can authorize a railroad to occupy the surface of a street it can subsequently permit or order the railroad to raise its tracks above the street and justify the impairment of property rights by the public interest. It was said in the Story case that "the public purpose of a street requires of the soil the surface only." And this was followed in *Fobes* v. *R., W. & O. R. Co.*, (121 N. Y. 505,) where a steam railroad was permitted upon a street without liability for consequential damages to adjoining property. The new principle based upon the public interest destroys all distinction between the surface of the soil of a street and the space above the surface, and, seemingly, leaves remaining no vital remnant of the doctrine of the Elevated Railroad cases. However, we need not go farther than the present case demands. When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.

And this is the ground of our decision. We are not called upon to discuss the power or the limitations upon the power, of the courts of New New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of State decisions the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the Elevated Railroad cases and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, and that these decisions might have been different or that the plaintiff might have balanced the chances of the commercial advantage between the right to have the street remain open and the ex-

pectation that it would remain so is too intangible to estimate. We certainly can estimate the difference between a building with full access of light and air and one with those elements impaired or polluted. But we have already expressed this. We need only add that the right of passage is not all there is to a street, and to call it the primary right is more or less delusive. It is the more conspicuous right, has the importance and assertion of community interest and ownership, properly has a certain dominance, but it is not more necessary to the making of a city than the rights to light and air, held, though the latter are, in individual ownership and asserted only as rights of pirvate property. The true relation and subordination of these rights, public and private, is expressed, not only by the Elevated Railroad cases, but by other cases. They are collected in 1 Lewis Eminent Domain, section 91*c*, and, it is there said, "established beyond question the existence of these rights, or easements, of light, air and access, as appurtenant to abutting lots, and that they are as much property as the lots themselves."

Judgment is reversed and cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice BROWN concurs in the result.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 99.—October Term, 1904.

Henry Muhlker, Plaintiff in Error,
vs.
The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company.

In error to the Supreme Court of the State of New York.

[April 10, 1905.]

Mr. Justice Holmes dissenting.

I regret that I am unable to agree with the judgment of the Court, and as it seems to me to involve important principles I think it advisable to express my disagreement and to give my reasons for it.

The plaintiff owns no soil within the limits of the avenue. The New York and Harlem Railroad Company at the time of the change was and long had been the owner, and the other defendant was the lessee of a railroad with four tracks along the middle of Park avenue, in front of the plaintiff's land, at the south end being at the surface of the avenue, and at the north in a trench about four feet and a half deep, the railroad being bounded on both sides by a masonry wall three feet high, which prevented crossing or access to the tracks. This is the finding of the Court of first instance and I take it to be binding upon us. We have nothing to do with the evidence. I take it to mean the same thing as the finding in *Fries* v. *New York & Harlem R. R.*, 169 N. Y. 270, that the defendants had "acquired the right without liability to the plaintiff to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16, 1897." The material portion of the decision of the Court of Appeals is that on this state of facts, as was held in the similar case of *Fries* v. *New York & Harlem R. R.*, the plaintiff had no property right which was infringed in such a way as to be anything more than *damnum absque injuria*. The finding that the railroad had the right to maintain the former structures was held to distinguish the case from the Elevated Railroad cases, where pillars were planted in the street without right as against the plaintiff. *Story* v. *New York Elevated R. R.*, 90 N. Y. 122, 160, 170, 178. *Lahr* v. *Metropolitan Elevated Ry.*, 104 N. Y. 268. The other so-called finding, that the new structure infringes the plaintiff's right, is merely a ruling of law that not-

withstanding the facts specifically found the plaintiff has a cause of action by reason of his being an abuttor upon a public street.

The plaintiff's rights, whether expressed in terms of property or of contract, are all a construction of the Courts, deduced by way of consequence from dedication to and trusts for the purposes of a public street. They never were granted to him or his predecessors in express words, or, probably, by any conscious implication. If at the outset the New York Courts had decided that apart from statute or express grant the abuttors on a street had only the rights of the public and no private easement of any kind, it would have been in no way amazing. It would have been very possible to distinguish between the practical commercial advantage of the expectation that a street would remain open and a right *in rem* that it should remain so. See *Stanwood* v. *Malden*, 157 Mass. 17. Again, more narrowly, if the New York Courts had held that an easement of light and air could be created only by express words, and that the laying out or dedication of a street, or the grant of a house bounding upon one, gave no such easement to abuttors, they would not have been alone in the world of the common law. *Keats* v. *Hugo*, 115 Mass. 204, 216. The doctrine that abuttors upon a highway have an easement of light and air is stated as a novelty in point of authority in *Barrett* v. *Johnson*, 15 N. J. Eq. 481, 489, and that case was decided in a State where it was held that a like right might be acquired by prescription. *Robeson* v. *Pittenger*, 1 Green Ch. 57.

If the decisions, which I say conceivably might have been made, had been made as to the common law, they would have infringed no rights under the Constitution of the United States. So much, I presume, would be admitted by every one. But if that be admitted, I ask myself what has happened to cut down the power of the same Courts as against that same Constitution at the present day. So far as I know the only thing which has happened is that they have decided the Elevated Railroad cases, to which I have referred. It is on that ground alone that we are asked to review the decision of the Court of Appeals upon what otherwise would be purely a matter of local law. In other words, we are asked to extend to the present case the principle of *Gelpcke* v. *Dubuque*, 1 Wall. 175, and *Louisiana* v. *Pilsbury*, 105 U. S. 278, as to public bonds bought on the faith of a decision that they were constitutionally issued. That seems to me a great, unwarranted and undesirable extension of a doctrine which it took this Court a good while to explain. The doctrine now is explained, however, not to mean that a change in the decision impairs the obligation of contracts, *Burgess* v. *Seligman*, 107 U. S. 20, 34; *Stanly County* v. *Coler*, 190 U. S. 437, 444, 445, and certainly never has been supposed to mean that all property owners in a State have a vested right that no general proposition of law shall be reversed, changed or modified by the Courts if

the consequence to them will be more or less pecuniary loss. I know of no constitutional principle to prevent the complete reversal of the Elevated Railroad cases to-morrow, if it should seem proper to the Court of Appeals. See *Central Land Co.* v. *Laidley*, 159 U. S. 103.

But I conceive that the plaintiff in error must go much further than to say that my last proposition is wrong. I think he must say that he has a constitutional right not only that the State Courts shall not reverse their earlier decisions upon a matter of property rights, but that they shall not distinguish them unless the distinction is so fortunate as to strike a majority of this Court as sound. For the Court of Appeals has not purported to overrule the Elevated Railroad cases. It simply has decided that the import and the intent of those cases does not extend to the case at bar. In those cases the defendants had impaired the plaintiff's access to the street. It is entirely possible and consistent with all that they decided to say now that access is the foundation of the whole matter; that the right to light and air is a parasitic right incident to the right to have the street kept open for purposes of travel, and that when, as here, the latter right does not exist the basis of the claim to light and air is gone.

But again, if the plaintiff had an easement over the whole street he got it as a tacit incident of an appropriation of the street to the uses of the public. The legislature and the Court of Appeals of New York have said that the statute assailed was passed for the benefit of the public using the street, and I accept their view. The most obvious aspect of the change is that the whole street now is open to travel, and that an impassable barrier along its width has been removed, in other words that the convenience of travellers on the highway has been considered and enhanced. Now still considering distinctions which might be taken between this and the earlier cases, it was possible for the New York Courts to hold, as they seem to have held, that the easement which they had declared to exist is subject to the fullest exercise of the primary right out of which it sprang, and that any change in the street for the benefit of public travel is a matter of public right, as against what I have called the parasitic right which the plaintiff claims. *Scranton* v. *Wheeler*, 179 U. S. 141. *Gibson* v. *United States*, 166 U. S. 269.

The foregoing distinctions seem to me not wanting in good sense. Certainly I should have been inclined to adopt one or both of them, or in some way to avoid the earlier decisions. But I am not discussing the question whether they are sound. If my disagreement was confined to that I should be silent. I am considering what there is in the Constitution of the United States forbidding the Court of Appeals to hold them sound. I think there is nothing; and there being nothing, and the New York decision obviously not having been given its form for the purpose of evading this Court, I think we should respect and affirm it, if we do not dismiss the case.

What the plaintiff claims is really property, a right *in rem*. It is called contract merely to bring it within the contract clause of the Constitution. It seems to me a considerable extension of the power to determine for ourselves what the contract is, which we have assumed when it is alleged that the obligation of a contract has been impaired, to say that we will make the same independent determination when it is alleged that property is taken without due compensation. But it seems to me that it does not help the argument. The rule adopted as to contract is simply a rule to prevent an evasion of the constitutional limit to the power of the States, and, it seems to me, should not be extended to a case like this. Bearing in mind that, as I have said, the plaintiff's rights, however expressed, are wholly a construction of the Courts, I cannot believe that whenever the Fourteenth Amendment or Article 1, Section 10, is set up we are free to go behind the local decisions on a matter of land law, and, on the ground that we decide what the contract is, declare rights to exist which we should think ought to be implied from a dedication or location if we were the local Courts. I cannot believe that we are at liberty to create rights over the streets of Massachusetts, for instance, that never have been recognized there. If we properly may do that, then I am wrong in my assumption that if the New York Courts originally had declared that the laying out of a public way conferred no private rights we should have had nothing to say. But if I am right, if we are bound by local decisions as to local rights in real estate, then we equally are bound by the distinctions and the limitations of those rights declared by the local Courts. If an exception were established in the case of a decision which obviously was intended to evade constitutional limits, I suppose I may assume that such an evasion would not be imputed to a judgment which four Justices of this Court think right.

As I necessarily have dealt with the merits of the case for the purpose of presenting my point, I will add one other consideration. Suppose that the plaintiff has an easement and that it has been impaired, bearing in mind that his damage is in respect of light and air, not access, and is inflicted for the benefit of public travel, I should hesitate to say that in inflicting it the legislature went beyond the constitutional exercise of the police power. To a certain and to an appreciable extent the legislature may alter the law of nuisance, although property is affected. To a certain and to an appreciable extent the use of particular property may be limited without compensation. Not every such limitation, restriction or diminution of value amounts to a taking in a constitutional sense. I have a good deal of doubt whether it has been made to appear that any right of the plaintiff has been taken or destroyed for which compensation is necessary under the Constitution of the United States. *Scranton* v. *Wheeler*, 179 U. S. 141. *Meyer* v. *Richmond*, 172 U. S. 82. See *Mugler* v. *Kansas*, 123 U. S. 623,

668. *Merchant* v. *Pennsylvania R. R.*, 153 U. S. 380. *Canfield* v. *United States*, 167 U. S. 518, 523. *People* v. *D'Oench*, 111 N. Y. 359, 361. *Sawyer* v. *Davis*, 136 Mass. 239. *Commonwealth* v. *Alger*, 7 Cush. 53. Compare *United States* v. *Lynah*, 188 U. S. 445, 470.

I am authorized to say that the CHIEF JUSTICE, Mr. Justice WHITE and Mr. Justice PECKHAM concur in the foregoing dissent.

True copy.

Test:

Clerk Supreme Court, U. S.